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DURGA CHARAN RAUTRAY
v.
STATE OF ORISSA & ANR.
(Civil Appeal No. 1735 of 2006)

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NOVEMBER 1, 2011

[R. M. LODHA AND JAGDISH SINGH KHEHAR, JJ.]

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Arbitration Act, 1940 – Contractual agreement – Disputes/claims raised by contractor-appellant – After receipt of payment on preparation of the final bill, without raising objection – Redressal by way of arbitration – High Court holding that the appellant having received payment after preparation of final bill without raising objections, could not have initiated arbitral proceedings – On appeal, held: Appellant despite having received payment after preparation of final bill without raising objections, could seek redressal of his disputes by way of arbitration in terms of the contractual agreement – He could still raise his unsatisfied claims before an arbitrator – Order referring the dispute raised by the appellant to the arbitral tribunal, having attained finality, the respondents were precluded from asserting that the claims raised by the appellant could not be adjudicated upon by way of arbitration – Order passed by the High Court was contradictory in terms – Once the High Court concluded that the Miscellaneous Case filed by the respondents raising objections was barred by limitation, it was not open to the High Court to consider one of the objections raised by the respondents and to uphold the same, so as to disentitle the appellant from reaping the fruits of the arbitral award – Thus, order passed by the High Court is set aside and that of the civil judge making arbitral award rule of the court, is upheld.

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Appellant was entrusted with a construction work by respondent-State. Dispute arose between the parties and were referred to an arbitral tribunal. The arbitral tribunal

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passed an award in favour of the appellant. The appellant filed an application to make the arbitral award, rule of the court. The respondents filed objections under Sections 30 and 33 of the Arbitration Act, 1940 by filing Miscellaneous Case. The Civil Judge dismissed the Miscellaneous Case on the ground of limitation. The award was made rule of the court. Aggrieved, the respondents filed an appeal before the High Court under Section 39 of the Arbitration Act, 1940. The High Court upheld the order of the Civil Judge on the issue of limitation, however, held that the appellant could not obtain the benefits of the award rendered by the Arbitral Tribunal in his favour since the appellant had received payments on the preparation of final bill without raising objections. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 A perusal of clause 23 of the contractual agreement leaves no room for any doubt that the appellant could claim arbitration on account of disputes arising from the contract "except where otherwise provided". Clause 23 includes within the purview of arbitration, disputes whether arising during the progress of the work or after the completion or abandonment thereof. There is no restraint whatsoever expressed in clause 23, which would deprive the appellant from seeking redressal by way of arbitration, merely because he had received payments after the preparation of the final bill, without raising any objections. Accordingly, even after the receipt of payment on the preparation of the final bill, it was open to the appellant to seek redressal of his disputes by way of arbitration, even though he had not raised any objections. [Para 8] [23-G-H; 24-A-C]

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A (2003) 8 SCC 154: 2003 (3) Suppl. SCR 122 – relied on.

1.2 Despite receipt of payment on the preparation of the final bill, it was still open to the appellant to raise his unsatisfied claims before an arbitrator, under the contract agreement. It was no longer open to the respondents to contest the claim of the appellant on the instant issue after the appellant had obtained the court order dated 15.05.1981 which referred the disputes raised by the appellant to an arbitral tribunal. The court order dated 15.05.1981 referring the disputes raised by the appellant to arbitration, attained finality inasmuch as the same remained uncontested at the hands of the respondents. The respondents were, thereafter precluded from asserting that the claims raised by the appellant could not be adjudicated upon by way of arbitration. Once the disputes raised by the appellant were referred for arbitration and the rival parties submitted to the arbitration proceedings without any objection, it is no longer open to either of them to contend that arbitral proceedings were not maintainable. Further, the order passed by the High Court is contradictory in terms. Once the High Court had concluded, that the Miscellaneous Case filed by the respondents raising objections was barred by limitation, it was not open to the High Court to consider one of the objections raised by the respondents and to uphold the same, so as to disentitle the appellant from reaping the fruits of the arbitral award. Once the plea of limitation had been upheld, the objection(s) filed by the respondents, irrespective of the merit(s) thereof were liable to be rejected. [Para 8] [24-E-H; 25-A-D]

1.3 The High Court erred in concluding that the appellant having received payment after preparation of the final bill, without having raised any objection, could not have initiated arbitral proceedings. The judgment

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rendered by the High Court is set aside. The order passed A
by the Civil Judge, Senior Division is upheld. [Para 9] [25-
E-F]

Case Law Reference:

2003 (3) Suppl. SCR 122 relied on Para 8 B

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From the Judgment & Order dated 22.12.2003 of the High
Court of Orissa at Cuttack in ARBA No. 14 of 2003. C

Ginny J. Rautray, Praveena Gautam for the Appellant.

Shibashish Misra for the Respondents.

The Judgment of the Court was delivered by D

JAGDISH SINGH KHEHAR, J. 1. The appellant was
entrusted with the construction of balance work of earth dam
in connection with the Kharkhai Irrigation Project upto RL
316.50 on 31.12.1975. The estimated cost of the said balance E
work was Rs.13,78,810/-. As per the contract agreement, the
work was to commence on 1.1.1976 and was to be completed
on or before 31.7.1976. For some reasons including change
in design, the work could not be completed within the
prescribed time. The appellant eventually completed the F
assigned work in July, 1978. This delay in completion of work,
according to the appellant, resulted in financial loss to the
appellant. In addition to the aforesaid, the appellant had some
other grievances as well. Illustratively, the appellant sought
payment towards some additional work executed by him, and G
also, refund of royalty deducted on account of the supply of
"morum". All these disputes were raised by the appellant, with
the concerned respondent(s). The respondent(s) chose not to
entertain the claims raised by the appellant. In fact, all
communications addressed by the appellant to the respondents H

A remained unanswered. The appellant then sought reference of his claims for adjudication before an arbitrator. This request of the appellant was also not heeded to. The appellant thereafter obtained a Court order dated 15.5.1981, whereby the disputes raised by the appellant were referred to an arbitral tribunal. The
 B arbitral tribunal examined nine items of claim raised by the appellant.

2. The award rendered by the arbitral tribunal dated 15.9.1998, adjudicated claim item nos. 4, 5, 6 and 9, in favour of the appellant. In so far as claim item no.4 is concerned, the
 C appellant had demanded an additional amount of Rs.2 lakhs on account of price escalation. This claim was based on the fact, that after the work was assigned to him, the State Government had revised minimum wages of labour, and increased the same by 16%. The appellant, accordingly,
 D claimed extra payment of 16% over the gross amount paid in the final bill. The arbitral tribunal held the appellant entitled to Rs.24,380/- towards price escalation. In claim item no.5, the appellant claimed Rs.5,51,173/- towards cost of "morum" supplied, but for which no payment had been released. In this
 E behalf, the appellant claimed carriage of 47,106 cubic meters with 15 kilometers lead, at the rate of Rs.21.35 per cubic meter. While adjudicating the instant claim, the arbitral tribunal found the appellant entitled to the difference between the cost of supply of "morum", as against the cost of supply of "earth". In
 F respect of claim item no.5, the appellant was held entitled to a sum of Rs.78,667/-. In claim item no.6, the appellant demanded a refund of Rs.20,727/- deducted towards royalty from his bills. The aforesaid royalty was allegedly charged on the "morum" supplied by the appellant. The appellant was held entitled to
 G refund of the entire sum of Rs.20,727/- deducted from his bills towards royalty. In so far as claim item no.9 is concerned, the appellant claimed interest at the rate of 18% per annum on the principal claim amount, from the due date till the date of final payment. The arbitral tribunal held the appellant entitled to
 H interest at the rate of 10% per annum on the principal awarded

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amount of Rs.1,23,724/-, with effect from 19.8.1981 (i.e., the date with effect from which the Interest Act, 1978 came into force) till 5.4.1992. Calculated in the aforesaid terms, the arbitral tribunal awarded interest of Rs.1,31,544/- to the appellant. A

3. Notice to make the arbitral award dated 15.9.1998 "rule of the court" was issued on 22.2.1999. In March, 1999, the respondents were served with the said notice. On 21.12.1999, the Government Pleader entered appearance on behalf of the respondents, and sought time to file objections. Objections on behalf of the respondents were filed before the Civil Judge, Senior Division, Bhubaneswar on 6.3.2000. To contest the arbitral award dated 15.9.1998, the respondents filed objections under sections 30 and 33 of the Arbitration Act, 1940 by filing a "Miscellaneous Case". It would be relevant to mention that section 30 aforesaid, postulates the grounds for setting aside an award, whereas, section 33 lays down the course to be adopted for challenging, inter alia, the validity of an arbitral award. B
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4. The "Miscellaneous Case", filed by the respondents was contested by the appellant inter alia by raising a preliminary objection. It was sought to be asserted, that the "Miscellaneous Case" was barred by limitation. The "Miscellaneous Case" filed by the respondents was rejected by the Civil Judge, Senior Division, Bhubaneshwar by accepting the plea of limitation raised by the appellant. The suit filed by the appellant was decreed on 30.4.2002. The award of the arbitral tribunal dated 15.9.1998 was made "rule of the court". The respondents were directed to pay the awarded amount to the appellant, failing which, the appellant was granted liberty to recover the same through Court. E
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5. Dissatisfied with the order passed by the Civil Judge, Senior Division, Bhubaneshwar, the respondents preferred an appeal before the High Court of Orissa under section 39 of the Arbitration Act, 1940. In the said appeal, the respondents H

- A raised two contentions. Firstly it was sought to be asserted, that the objections filed by the respondents through the "Miscellaneous Case" filed under sections 30 and 33 of the Arbitration Act, 1940, were wrongly rejected by the Civil Judge, Senior Division, Bhubaneshwar, on the ground of limitation.
- B Secondly it was asserted, that the controversy raised by the appellant could not have been referred for adjudication by way of arbitration, after the appellant had received the final bill without raising any objection.

C 6. The determination by the Civil Judge, Senior Division, Bhubaneshwar, on the issue of limitation was upheld by the High Court. Yet the contention advanced at the hands of the respondents, that it was not open to the appellant to have sought adjudication of his claims, by way of arbitration, after the appellant had received payments on the preparation of the final bill without raising any objections, was accepted. In sum and substance, therefore, by its order dated 22.12.2003 it was concluded by the High Court, that the appellant could not reap the benefits of the award rendered by the arbitral tribunal in his favour on 15.9.1998.

E 7. Dissatisfied with the judgment rendered by the High Court dated 22.12.2003, the appellant filed a petition for special leave to appeal bearing no.12183 of 2004. Leave was granted on 20.3.2006. Consequently, the matter came to be renumbered as civil appeal no.1735 of 2006.

F 8. Since the plea of limitation had been decided in favour of the appellant and against the respondents, the only question to be adjudicated upon, in the present appeal filed by the appellant, is, whether the disputes/claims raised by the appellant could have been referred for arbitration, after the appellant had received payment after the preparation of the final bill, without raising any objections. The answer to the instant query must necessarily flow from the relevant clause of the agreement which entitled the appellant to seek redressal of

G disputes through arbitration, as it is the arbitration clause alone

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which defines the parameters of the disputes which rival parties can raise for adjudication before an arbitrator (or arbitral tribunal). In so far as the instant aspect of the matter is concerned, clause 23 of the agreement dated 31.12.1975 is relevant. The same is being extracted hereinbelow: A

“Clause 23 – Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship of materials used on the work, or as to any other questions, claim, right matter, or thing whatsoever, if any way arising out of, or relating to the contract, designs, drawings, specifications, estimates instructions, orders or these conditions, or otherwise concerning the work or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the concerned Chief Engineer. If there be no such Superintending Engineer, it should be referred to the sole arbitration of the Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a Government Servant. The award of the Arbitrator so appointed shall be final, conclusive and binding on all parties to these contract.” B
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A perusal of clause 23 of the contractual agreement extracted above, leaves no room for any doubt that the appellant could claim arbitration on account of disputes arising from the contract “except where otherwise provided”. It is not the case of the respondents, that the appellant was precluded by any clause in the contractual agreement from seeking settlement of claims raised by the appellant (which have been allowed in favour of the appellant by the arbitral tribunal). Clause 23 includes within the purview of arbitration, disputes whether arising during the G
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A progress of the work or after the completion or abandonment thereof. There is no restraint whatsoever expressed in clause 23, which would deprive the appellant from seeking redressal by way of arbitration, merely because he had received payments after the preparation of the final bill, without raising
 B any objections. Accordingly, we are of the view, that even after the receipt of payment on the preparation of the final bill, it was open to the appellant to seek redressal of his disputes by way of arbitration, even though he had not raised any objections. *Secondly*, in so far as the instant aspect of the matter is
 C concerned, the issue in hand stands concluded by this Court in *Bharat Coking Coal Ltd. v. Annapurna Construction* (2003) 8 SCC 154 wherein it has been held as under:

D “Only because the respondent has accepted the final bill, the same would not mean that it was not entitled to raise any claim. It is not the case of the appellant that while accepting the final bill, the respondent had unequivocally stated that he would not raise any further claim. In absence of such a declaration, the respondent cannot be held to be estopped or precluded from raising any claim...”.

E In the instant case also the appellant, while accepting payment on the preparation of the final bill, did not undertake that he would not raise any further claims. As such, we are satisfied that the judgment rendered in *Bharat Coking Coal Ltd.*, case
 F (supra) leads to the irresistible conclusion, that despite receipt of payment on the preparation of the final bill, it was still open to the appellant to raise his unsatisfied claims before an arbitrator, under the contract agreement. *Thirdly*, it was no longer open to the respondents to contest the claim of the
 G appellant on the instant issue after the appellant had obtained the court order dated 15.5.1981 which referred the disputes raised by the appellant to an arbitral tribunal. The Court order dated 15.5.1981 referring the disputes raised by the appellant to arbitration, attained finality inasmuch as the same remained
 H uncontested at the hands of the respondents. The respondents

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were, thereafter precluded from asserting that the claims raised by the appellant could not be adjudicated upon by way of arbitration. Once the disputes raised by the appellant were referred for arbitration and the rival parties submitted to the arbitration proceedings without any objection, it is no longer open to either of them to contend that arbitral proceedings were not maintainable. And *fourthly*, the order passed by the High Court is contradictory in terms. Once the High Court had concluded, that the Miscellaneous Case filed by the respondents raising objections was barred by limitation, it was not open to the High Court to consider one of the objections raised by the respondents and to uphold the same, so as to disentitle the appellant from reaping the fruits of the arbitral award. In other words, once the plea of limitation had been upheld, the objection(s) filed by the respondents, irrespective of the merit(s) thereof were liable to be rejected.

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9. For the reasons recorded hereinabove, we are of the view that the High Court erred in concluding that the appellant having received payment after preparation of the final bill, without having raised any objection, could not have initiated arbitral proceedings. The judgment rendered by the High Court dated 22.12.2003 is, accordingly, set aside. The order passed by the Civil Judge, Senior Division, Bhubaneswar dated 30.4.2002 is upheld. The instant appeal is accordingly allowed. The respondents are directed to pay the appellant the awarded amount, failing which, the appellant shall be at liberty to recover the same through Court.

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10. There will be no order as to costs.

N.J.

Appeal allowed.