

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).17028/2003

(From the judgement and order dated 03/03/2003 in MA No. 136/1997
of The HIGH COURT OF JHARKHAND AT RANCHI)

M/S. BUILDERS ENTERPRISES

Petitioner(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

(With prayer for interim relief and office report)

Date: 23/10/2007 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. MATHUR

HON'BLE MR. JUSTICE MARKANDEY KATJU

For Petitioner(s) Mr. Kaushik Poddar, Adv.
 Mr. Rudreshwar Singh, Adv.
 Mr. Gopal Kumar Jha, Adv.
 Mr. Kumar Ranjan, Adv.
 Mr. Saurabh Jain, Adv.
 Mr. Sanjay Jain, Adv.

For Respondent(s) Mr. B. Dutta, ASG
 Mr. Ashok Bhan, Adv.
 Mrs. Rajni Ohri Lal, Adv.
 Mr. R.C. Kathia, Adv.
 Ms. Varuna Bhandari Gugnani, Adv.
 Mrs. Anil Katiyar, Adv.

UPON hearing counsel the Court made the following
ORDER

Leave granted.

The appeal is dismissed in terms of the signed order. No order as to
costs.

(Ajay Kr. Jain)
Court Master

(Vijay Dhawan)
Court Master

(Signed order is placed on the file)
IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4972 OF 2007
(Arising out of SLP(C) No. 17028 of 2003)

M/s. Builders Enterprises Appellant

Versus

Union of India & Ors. Respondents

ORDER

Heard learned counsel for the parties.

Leave granted.

This appeal is directed against the judgment and order dated 3.3.2003 passed by learned Single Judge of the High Court of Jharkhand at Ranchi whereby the learned Single Judge set aside the order dated 24.1.1997 passed by the Sub-Judge IV at Ranchi in Money Suit No. 11 of 1993 whereby the Sub-Judge allowed the prayer of the plaintiffs-appellant and granted interim injunction restraining the defendant-respondent to proceed with the notice and refer the dispute to the arbitration by appointing an Arbitrator.

It is alleged that the Chief Engineer, Lucknow Zone, Military Engineering Service Department invited tenders for construction of one R.C.C. overhead tank of 2 lakh gallons capacity at Khojatoli in the District of Ranchi in the State of Bihar (now in Jharkhand) on rates and terms and conditions provided in the contract. The tender of the plaintiff-appellant was accepted and an agreement dated 18.4.1990 was entered into between the plaintiff-appellant and defendant No.2 on behalf of the respondent-Union of India. The agreement provided for commencement of the aforesaid work on and from 22.5.1990 and completion thereof by 21.5.1991 which was extended till 31.3.1992 with normal terms and conditions. It is alleged that the plaintiff-appellant commenced its work and took all preparatory measures such as engagement of engineers and other technical personnel, supervisors, labourers and other staff necessary for the purpose, and also obtained the required material, machinery and other equipments. It is alleged that it was obligatory on the defendants No. 2 and 3 to handover the site in question upon which the proposed construction was to be made to and in favour of the appellant within the time prescribed, and to supply the design for construction of various stages beginning with the design of the foundation for the aforesaid construction of proposed overhead tank and to make available to the plaintiff-appellant adequate supply of water and electricity. The plaintiff-appellant submitted that while the work was in full swing, due to various defaults and negligence and delay on the part of defendants No. 2 and 3, which included making available to the plaintiff defective and wrong designs for construction of the aforesaid water tank and failure to supply adequate quantity of water required for construction of the said tank and stopping of work by the Assistant Garrison Engineer, Ranchi for reason of impending change in design of foundation, the plaintiff-appellant had to suspend the work some time in

September and the beginning of October, 1991. It was only on 15.10.1991 that the plaintiff-appellant was supplied with the change in design of foundation and the respondents thereupon asked the appellant to restart the work all over again according to the changed design in contravention of the terms and conditions subsisting between the plaintiff and the defendants as per the work order. It is alleged that consequent upon the unauthorized change in the design of the foundation of the said R.C.C. overhead tank under construction as lately as on 15.10.1991 by the change in design on the foundation itself, the whole work would have to be started all over again. On 11.11.1991 the plaintiff-appellant brought to the notice of the defendant No. 2 that the Assistant Garrison Engineer, Ranchi had stopped further progress of the work for an indefinite period till the suspected wrong design was confirmed and rectified. The appellant-plaintiff also protested that the said change in design would result in abnormal increase in the cost of the execution of the said contract and requested for extension of time till 15.10.1992. On 14.7.1992 discussions were held between defendant No. 3 and the plaintiff's partner Roshan Lal Bhatia. The plaintiff-appellant apprised the defendant with the difficulties in the defective designs and change in designs made belatedly. Defendant No. 3 agreed that they will recommend to the higher authorities for extension of time for completion of work till 31.12.1992. The defendant No. 3 by letter dated 7.5.1992 communicated to the appellant about extension of period of completion till 20.5.1992, i.e., allowing to the appellant a period of merely 13 days for construction of the said R.C.C. overhead tank of 2 lakh gallons capacity which was not only impracticable and unreasonable but also impossible to be accomplished. Therefore on account of serious disputes the work could not be completed and it is alleged that the work was got completed by some other contractor. It is alleged that in the meanwhile, the plaintiff-appellant had suffered loss to the tune of Rs. 8.25 lakhs, and hence the appellant after giving a notice under Section 80 C.P.C. filed a suit for recovery of the aforesaid amount alongwith interest and valuation was done at Rs. 8,74,500/- for the purposes of suit.

The suit was contested by the defendant-respondent who inter alia took the plea that as per Clause 70 of the Agreement, the parties have to go for arbitration and the suit cannot proceed. Thereafter an injunction was granted by the Trial Court restraining the defendant-respondent from proceeding to appoint the arbitrator.

Against the order dated 23.1.1996 of the Sub-Judge, Ranchi, an appeal

was preferred by the respondent-Union of India before the High Court. By the impugned order the High Court has set aside the order passed by the Sub-Judge. Hence, the present appeal by special leave.

Before dealing with the case, we may quote Clause 70 of the Agreement which is the arbitration agreement between the parties. The relevant part of the clause reads :-

"70. Arbitration- All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them be referred to the sole arbitration of an Officer serving officer having degree in Engineering or equivalent or having passed Final/Direct Final Examination of Sub Division II of Institution of Surveyors (India) recognized by the Govt. of India to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the works or termination or determination of the Contractor under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Agency or Agencies."

Learned counsel for the appellant has submitted that as per Section 34 of the Arbitration Act, 1940 where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings.

Learned counsel submitted that since the defendant had filed a written statement in the suit Section 34 of the Arbitration Act could not be invoked.

Learned counsel for the appellant further submitted before us that the defendant-respondent had failed to appoint an arbitrator although the plaintiff served a notice on 11.6.1992 to the defendant asking it to refer the dispute for arbitration. In reply to the said letter the defendant sent a reply dated 23.7.1992 stating that in view of Clause 70 the dispute could be referred for arbitration only after completion of the work. Since the defendant refused to refer the dispute to arbitration the plaintiff-appellant after serving notice to the defendant under Section 80 C.P.C. resorted to the remedy of a suit. It is submitted that now the defendant who could have appointed the Arbitrator under Clause 70 of the Agreement, has lost the ground and right to appoint the arbitrator since the appellant had already filed a suit for recovery of money as damages suffered by him for incomplete work of the R.C.C. tank and a written statement had been filed in the suit. Learned counsel for the appellant submitted that even in the written statement filed by the defendant-respondent they did not point out whether they have got the work completed by any other agency or whether they were justified in doing so or not. Hence it is alleged that the defendants-respondent have lost the right to now appoint an arbitrator and resolve the disputes through arbitration.

In our opinion it is very clear from the order dated 23.1.1996 passed by the learned Sub-Judge, Ranchi that the defendants-respondent was ready and willing to go for arbitration but earlier they could not appoint the arbitrator because of non-completion of the work as it was premature. However, now the work has been completed by another party and therefore the defendants-respondent are ready and willing to refer the dispute to arbitration. It was submitted by the respondent that Section 34 of the Arbitration Act, 1940 was attracted to the facts of this case, and it did not prohibit the Sub-Judge in the present case to appoint an arbitrator. Clause 70 of the Agreement clearly contemplates that all disputes between the parties to the contract shall, after written notice by either party to the contract to the other, be referred to the sole arbitration of a serving officer having degree in Engineering or equivalent. The dispute in the present case is whether on account of non-cooperation of the respondents the work could not be completed or whether the fault lies with the contractor. But at the same time there is a proviso in the arbitration agreement which is very relevant which contemplates that in the event of abandonment of

the works or cancellation of the contract under condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the works completed by or through any other contractor or agency or agencies.

It is submitted by the respondent that initially the respondent could not act on the notice given by the contractor appellant because at that time the work was incomplete and the alternative contractor had not been appointed to complete the work. However, the work had subsequently been completed by another agency and therefore now the respondent was ready and willing to appoint an arbitrator. It is submitted that since the work has been completed by another agency, the respondent disclosed to the learned Sub-Judge that they were ready and willing to go for arbitration and appoint an arbitrator in terms of clause 70 of the Agreement. In our opinion, in this situation, there was nothing which prevented the Trial Court to appoint an arbitrator in terms of clause 70 of the Agreement.

As regards the submission of learned counsel for the appellant that Section 34 of the Arbitration Act was not attracted since a written statement had been filed in the Suit we find no merit in this submission. It may be noted that the written statement filed in the suit was a composite one, taking both the pleas that the suit was not maintainable in view of the arbitration agreement, and also denying the plaintiff's case on merits. In our opinion, the words "before filing a written statement" in Section 34 have to be given a purposive and not literal interpretation. Where such a composite plea is taken in the written statement Section 34 does get attracted and hence the suit should be stayed. We, therefore, reject this submission of learned counsel for the appellant.

Having regard to the facts and circumstances of the case, we now direct that the Chief Engineer, Lucknow Zone, Military Engineering Service Department, Lucknow Cantonment-2 shall appoint any engineer in terms of Clause 70 of the agreement to resolve the disputes between the parties. The arbitrator to be appointed, if possible, shall be located at Ranchi so as to facilitate the appellant contractor to place its claim in a proper manner. In case, no officer is available at Ranchi, then the arbitrator appointed shall hold the arbitration proceedings at Ranchi. The Chief Engineer, Lucknow Zone, Military Engineering Service Department, Lucknow Cantonment-2 shall appoint the arbitrator within a period of two weeks from the date of receipt of copy of this

order. The plaintiff-appellant will be free to place the claim before the arbitrator within the time provided by the arbitrator. The arbitrator shall enter upon the reference as soon as possible and pass his award as far as possible within a period of four months from the date of taking over the arbitration proceedings.

In the above facts and circumstances, the order dated 3.3.2003 passed by the learned Single Judge of the High Court impugned herein is upheld.

The appeal is dismissed with no order as to costs.

(A.K.MATHUR)

.....J.

(MARKANDEY KATJU)

.....J.

New Delhi
October 23, 2007