KERALA STATE SCIENCE & TECHNOLOGY MUSEUM A

v.

RAMBAL COMPANY AND ORS.

AUGUST 2, 2006

[ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.] B

Practice and procedure:

Reference—Made on a specific question by Single Judge to Division Bench—Held: Bench must decide that question only and not the one not referred. C

The respondent no.1 had entered into an agreement with appellant-Society for construction of a building. Dispute arose between them and the appellant terminated the agreement on the allegation of breach of contract by respondent no.1. Appellant issued a notice dated 6.11.1990 which was duly replied by respondent no.1. On 12.1.1998, respondent no.1 received demand notice from Deputy Tehsildar under Section 34 of Revenue Recovery Act. D

Respondent no.1 filed Writ Petition before High Court seeking quashing of the demand notice, which came up for hearing before Single Judge. Respondent no.1 had raised contentions before Single Judge that since breach of contract is not admitted, the appellant cannot unilaterally assess the damage alleged to have sustained by it on account of the alleged default on the part of respondent no.1; that the entire proceedings are time-barred. Stand of the appellant was that it is a society owned by the State and, therefore, Article 112 of the Limitation Act, 1963 is applicable and in that view, the demand raised is well within time. E F

In view of the nature of the contentions raised, Single Judge placed the matter before a Division Bench. G

The Division Bench proceeded on the basis as if the main question that arose for consideration was that when a breach of conditions of a contract is not admitted, whether is open for the contractee to adjudicate upon the disputed question of breach as well as to assess the damages

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A **arising from the breach and held that one of the contracting parties cannot adjudicate upon a disputed question of breach as well as assess the damage arising from the breach. Aggrieved appellant filed the present appeal.**

Disposing of the appeal and remitting the matter to High Court, the Court

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HELD: It is fairly well settled that when reference is made on a specific issue either by a Single Judge or Division Bench to a larger Bench i.e. Division Bench or Full Bench or Constitution Bench, as the case may be, the Larger Bench cannot adjudicate upon an issue which is not the question referred. In the instant case, there was no reference to Division C **Bench. The Single Judge felt that in view of the contentions, a Division Bench should hear the case. Unfortunately the Division Bench did not consider the contentions which were raised before the Single Judge. It also did not record any positive finding as to whether the document relied upon by the appellant clearly established admission of a breach of contract. The** D **basic issue related to the question whether the demand was barred by limitation, which the Division Bench of the High Court did not examine. [248-C-D-E; 249-B-D]**

Kesho Nath Khurana **v.** *Union of India and Ors.*, **[1981] Supp. SCC 38;** *Samaresh Chandra Bose* **v.** *The District Magistrate, Burdwan and Ors.*, E **[1972] 2 SCC 476 and** *K.C.P. Ltd.* **v.** *State Trading Corporation of India and Anr.*, **[1995] Supp. (3) SCC 466, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4854 of 2000.

From the Judgment and Order dated 23.3.2000 of the High Court of F Kerala at Ernakulam, in O.P. No. 23815 of 1999.

WITH

C.A. No. 3211 of 2006.

Harish Beeran, N. Rao and Radha Shyam Jena for the Appellant.

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Beena Prakash, G. Prakash and B.V. Deepak (for T.K. Deepak & Co.) for the Respondents.

The Judgment of the Court was delivered by

H **ARIJIT PASAYAT, J.** Challenge in these appeals is to the judgment

of a Division Bench of the Kerala High Court holding that quantification of damages done and demanded from the respondent No.1 cannot be legally sustained and accordingly they were set aside. The writ petition was directed to be placed before the Division Bench by a learned Single Judge. But the question referred by learned Single Judge i.e. question of limitation was left open to be adjudicated by the appropriate authority in accordance with law.

The background facts in a nutshell are as follows :-

The respondent No.1 had entered into Ext. P1 agreement with the appellant-Kerala State Science and Technology, Thiruvananthapuram which is a society registered under the Travancore Cochin Literary and Scientific Societies Registration Act, 1995, on 16.05.1988 for the construction of planetarium building of the Kerala State Science and Technology Museum and allied Civil Works. Dispute having arisen between the parties the agreement came to be terminated by Ext. P2 termination notice dated 03.11.1989 issued by the appellant. Ext. P2 was followed by Ext. R1(c) letter from the managing Partner of the respondent No.1 allegedly admitting the breach of contract. Suit notice dated 06.11.1990 issued by the appellant to the respondent No.1 which was replied by it as per Ext. P3 dated 31.12.1990 repudiating the alleged breach and raising a counter-claim. According to the respondent No.1 there was a long silence after Ext. P3 which was broken on 12.01.1998 on which date it received Ext. P4 demand notice from the Deputy Tahsildar (RR), Thiruvananthapuram under Section 34 of the Revenue Recovery Act 1968 calling upon it to remit an amount of Rs.22,10,303/- with future interest at the rate of 12% from 01.04.97. On receipt of Ext. P4 the respondent No.1 moved the High Court with Arbitration Request No.2/98 under Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of an arbitrator for resolution of all disputes and differences between the parties concerning the performance of the work under Ext. P1 agreement. The request was resisted by the appellant contending, *inter-alia*, that there is no provision for arbitration in Ext. P1 agreement. It was also contended that as per clause 54 of Ext P1 agreement, there is a specific exclusion of resolution of disputes by arbitration and the Civil Courts at Thiruvananthapuram alone are clothed with jurisdiction to resolve the disputes arising between the parties out of Ext.P1 agreement. In other words, not only Ext. P1 does not contain an arbitration clause, on the contrary, Ext. P1 specifically rules out arbitration as a mode of settlement of disputes or claims arising out of Ext. P1. Accepting the said contentions the High Court rejected the request. After the said order was passed by the High Court, the respondent

A No.1 filed writ petition, being O.P. No. 22633/98 to quash Ext. P4 demand notice and for other reliefs which came to be disposed of by judgment dated 17.11.98 directing the District Collector to consider and pass orders on the representation preferred by the respondent No.1 within one month from the date of receipt of a copy of the judgment. Pending issuance of orders by the B District Collector as aforesaid, the demand notice as evidenced by Ext. P4 was stayed. As a sequel to the judgment, the District Collector passed an order rejecting Ext. P8. Upon rejection of Ext.P8 by District Collector's order Ext.P4 was revived and the respondent No.1 was called upon to pay the amount mentioned therein being the loss suffered by the appellant in re-arranging the work at the risk and cost of the respondent No.1. It was at this C stage, that the said respondent moved the High Court by filing a writ petition praying for the issuance of a writ of *certiorari* or any other appropriate writ, direction or order quashing the order and Ext.P4 demand notice as illegal and arbitrary and for the issuance of a writ of *mandamus* declaring that revenue recovery proceedings may be initiated against the respondent No.1 only after prior adjudication by a court of law or any other independent judicial/quasi-D judicial body and other reliefs.

When the writ petition came up for hearing before learned Single Judge, it was contended by the learned counsel for the writ-petitioner that since breach of contract is not admitted, the first respondent (present appellant), E standing in the position of another party to the contract, cannot unilaterally assess the damage alleged to have sustained by it on account of the alleged default on the part of the writ-petitioner. It was also contended that the amount demanded as per Ext. P4 is time barred. Further contention of the writ-petitioner was that since the entire proceedings are barred, a time barred debt cannot be recovered by recourse to revenue recovery proceedings. Stand F of the first respondent (present appellant) it is a society owned by the State and, therefore, Article 112 of the Limitation Act, 1963 (in short the 'Limitation Act') is applicable and in that view, the demand raised is well within time. In view of the nature of the contentions raised, learned Single Judge felt that the matter should be placed before a Division Bench.

G The Division Bench proceeded on the basis as if the main question that arose for consideration was where a breach of conditions of a contract is not admitted, whether is open for the contractee to adjudicate upon the disputed question of breach as well as to assess the damages arising from the breach. Though the High Court take note of the fact that the appellants placed reliance H on the document Ex.RI (C) to contend that there was admitted breach of

contract which resulted in termination of the contract, the respondent No.1 disputed the position and submitted that no breach of contract can be spelt out as seen from the document Ex.P3. High Court came to the conclusion that one of the contracting parties cannot adjudicate upon a disputed question of breach as well as assess the damage arising from the breach. It, however, noted that the position would be different where there is no dispute or there is consensus between the contracting parties regarding breach of conditions. In such a case an officer of the State even though a party to the contract will be well within its right in assessing the damages in view of the specific terms of clause 12 of the Contract.

In support of the appeals, learned counsel for the appellants submitted that there was no dispute about breach of contract. In fact, in the letter dated 14.2.1990 Ex.R1(C) it was accepted that there was breach of contract. The relevant portions of the document read as follows :

> "We fully realize that the above demand put forth by the then General Manger Sreekumar asking for enhancement of rates is against the spirit of the agreed contract and that is why the museum and the Government took the decision to rearrange the work through some other agency at out risk and cost.
>
> We therefore, humbly request you to kindly permit us to withdraw the company's letter referred above and offer the said work by our company.
>
> 1. We are ready to complete the work without any change in the rates for all times of work that we have agreed previously.
>
> 2. We are ready to complete the work in all aspects without even giving us any Mobilisation advance by the museum.
>
> 3. We request for an extension of 12 months time to complete the work in all respects and we will strive our level best to finish the same much in advance."

It was further submitted that before the learned Single Judge it was not disputed that there was a breach of contract. In fact, the only point urged before learned Single Judge related to the question whether the claim was barred by time. Stand was that a time barred demand cannot be enforced through revenue recovery proceedings. That was the issue which forms subject-matter of dispute and considering the importance of that matter, learned

A single judge felt that the matter should be heard by a Division Bench. It was submitted that when a reference is made by learned Single Judge to the Division Bench on a particular issue, the Division Bench cannot travel beyond that issue and decide other matters.

In response, learned counsel for the respondent No.1 submitted that in
B fact there was no reference by learned Single Judge, who only held that considering the importance of the matter the case should be heard by a Division Bench. It is also submitted that there was dispute regarding breach of conditions of contract.

It is fairly well settled that when reference is made on a specific issue
C either by a learned Single Judge or Division Bench to a larger Bench i.e. Division Bench or Full Bench or Constitution Bench, as the case may be, the Larger Bench cannot adjudicate upon an issue which is not the question referred. (See: *Kesho Nath Khurana* v. *Union of India and Ors.*, [1981] Supp. SCC 38, *Samaresh Chandra Bose* v. *The District Magistrate, Burdwan and*
D *Ors.*, [1972] 2 SCC 476 and *K.C.P. Ltd.* v. *State Trading Corporation of India and Anr.*, [1995] Supp. 3 SCC 466).

In the instant case, there was no reference to Division Bench. Learned Single Judge felt that in view of the contentions, a Division Bench should hear the case.

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We find that before learned Single Judge there was practically no dispute that there was breach of conditions of contract. In fact learned Single Judge noted the position as follows:

> "*The question of termination of contract with effect from 25.11.1989*
F *is not disputed. Petitioner did not challenge the termination order.* As per the terms of the contract, if it is re-tendered, the difference in the re-tender amount and the loss suffered have to be paid by the petitioner apart from the liquid damages."
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> (Italics for emphasis)

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The learned Single Judge also noted that the main contention of the writ petitioner was that the amount demanded was time barred. Reference was made to Section 71 of the Kerala Revenue Recovery Act, 1968. Therefore, it was contended before learned Single Judge that when the matter is time
H barred even if the demand is correct it cannot be enforced through revenue

recovery proceedings. Stand of the appellants on the contrary was that the society is owned by the State and, therefore, Article 112 of the Limitation Act, 1963 is applicable and the demand was raised within time. A

Considering the rival submissions learned Single Judge held that in view of the nature of contention the matter should be heard by a Division Bench. B

Unfortunately the Division Bench did not consider the contentions which were raised before the learned Single Judge. It also did not record any positive finding as to whether the document relied upon by the appellant clearly established admission of a breach of contract. The portion of the order of learned Single Judge, quoted above, suggests that there was no dispute when read in the context of the letter dated 14.2.1990. C

As rightly contended by learned counsel for the appellant the basic issue related to the question whether the demand was barred by limitation. As noted above the Division Bench of the High Court did not examine this question. D

Above being the question we set aside the order of the Division Bench and remit the matter back for fresh consideration limiting the examination to the question whether the demand by barred by limitation. Interim order dated 1.10.1999 shall be operative till the disposal of the matter by the Division Bench. We make it clear that merely because interim protection has been given that shall not be considered to be expression of opinion on merits. E

The appeals are disposed of accordingly. No costs.

D.G. Appeals disposed of.