The Superintending Engineer and anr. Vs. International Constructions Company

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Court : Andhra Pradesh

Decided On : Jul-21-1995

Reported in : 1996(2)ALT572

Judge : P. Venkatarama Reddi and ;D.H. Nasir, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 21; Arbitration Act, 1940 - Sections 2 and 41

Appeal No. : C.R.P. No. 701 of 1987 and A.A.O. No. 189 of 1987

Appellant : The Superintending Engineer and anr.

Respondent : international Constructions Company

Advocate for Def. : T.V. Narasimha Murthy, Adv.

Advocate for Pet/Ap. : Govt. Pleader for Arbitration

Judgement :

P. Venkatarama Reddi, J.

1. The revision petition and the miscellaneous appeal filed by the Superintending Engineer and the Executive Engineer, Nagarjunasagar Left Canal Division arise

out of the judgment in O.S.No. 153 of 1982 and O.P. No. 411 of 1982 respectively on the file of the Addl. Chief Judge-cum-First Addl. Special Judge for SPE Cases, Hyderabad. CS.No. 153 of 1982 was filed by the arbitrators Under Section 14 of the Arbitration Act (hereinafter referred to as the Act') to record the award passed by them on 15-2-1982 and to make it a Rule of the Court. O.P.No. 411 of 1982 was filed by the appellants herein Under Sections 30 and 33 of the Act objecting to the award passed on various grounds. By the award, the panel of arbitrators awarded an amount of Rs. 3,30,200/- in lumpsum with interest at 10% per annum payable from the date of the award. The objections filed against the award were overruled by the trial Court and a decree was passed in terms of the award subject to the reduction in the rate of interest from 10% to 6% p.a.

2. A few relevant facts may be noted. Pursuant to the notification issued by the Government of Andhra Pradesh inviting tenders under international competitive bidding for the work relating to 'Earth work excavation and forming embankment of 21st main branch canal of N.S. Left Canal from K.M. 54.00 to 55.00 including construction of masonry structures, the respondent's tender was accepted and an agreement was entered into an 7-12-1977. The value of the contract was Rs. 71.15 lakhs. The work was to be completed within 24 months. However, the contract period was extended up to 16-11-1980. As the claim put forward by the respondent-contractor was not accepted by the department, the disputes were referred to a panel of arbitrators consisting of a retired High Court Judge (A.D.V. Reddy, J.), a Chief Engineer and a retired Secretary to the Government of Karnataka. The claim statement was filed on 11-8-1981. There were five claims which are set out below:

Claim No. 1: Escalation of the agreement rates based on the increase in the cost of owner-supplied materials. The claim was laid for a sum of Rs. 18.42 lakhs under this head.

Claim No. 2: Non-inclusion of storage charges while making payments towards escalated price of diesel oil. Rs. 27,422/- was claimed.

Claim No. 3: Refund of the amount recovered by virtue of unilateral change in the agreement regarding consumption of diesel oil. Rs. 67,007/- has been claimed

under this head.

Claim No. 4: Payment on account of escalation of labour charges. The amount claimed was Rs. 6,394/-.

Claim No. 4-A: Compensation and damages on account of prolongation of contract period by allowing 40% extra. Under this head a sum of Rs. 6,99,016/- was claimed.

Claim No. 5: The respondent claimed payment of interest at 16 1/2% from 15-10-1980 to 15-9-1981 and the same was quantified at Rs. 2.94 lakhs.

3. The arbitrators referred in brief to the nature of the claims and the answer of the respondents (appellants herein) and made a lumpsum award of Rs. 3,30,200 /- without giving any break-up in relation to each claim. Interest at 10% per annum from 15-3-1982 i.e., from the date of the award was allowed on the said sum.

4. The validity and the legality of the award and the judgment of the lower Court confirming the award is under challenge before us. We would like to examine each claim separately in order to consider whether the claim falls within the scope of jurisdiction of the arbitrators and whether the arbitrators were competent to award any sum in acceptance of these claims wholly or partly. As already noticed, the award is a non-speaking, lumpsum award. The limitations inherent in scanning such awards spelt out by a plethora of decided cases have to be necessarily kept in view. We should also bear in mind that an award is vulnerable to challenge only on the grounds mentioned in Sections 30 and 16 of Arbitration Act.

5. For the sake of convenience, we will first take up claim No. 4-A. It is a common ground that before the arbitration started, the respondent did not demand payment of compensation for the alleged loss sustained by him on account of extended period of contract. It is also an admitted fact that the said claim was not included in the claim statement filed before the arbitrators on 11-8-1981. Even in the amended claim statements dated 18-9-1981 and 15-10-1981, we do not find any reference to this claim. Both the counsel were unable to enlighten us as to when exactly this claim was made. It may be mentioned that in the amended claim statement filed

on 15-10-1981, the claim was made 'for damages measured as interest at 16..5% from 15-10-1980 to 15-9-1981'. Thus, the damages in the form of interest were claimed from the date of expiry of the extended period of contract up to the date of filing rebuttal statement. But, it is clear that this claim (4-A) was not the subject-matter of reference to the arbitrators. It was a claim subsequently made after the arbitration proceedings commenced. In the O.P., the appellants raised an objection against the inclusion of new claims and increasing the quantum of amount originally claimed. That objection was not dealt with by the lower Court.

6. We are of the view that this claim ought not to have been entertained and considered by the arbitrators as it was beyond their jurisdiction to do so. A dispute of this nature raised for the first time after the arbitration proceedings commenced, will not, in our considered view, fall within the scope of arbitration clause. Clause 85 of the conditions of contract forming part of the Agreement is as follows:

'85. ARBITRATION:

(i) If at any time, any question, disputes or difference whatsoever shall arise between the owner and the contractor, upon or in relation to or in connection with this contract, either party may forthwith give to the other notice in writing of the existence of such question, dispute or difference and the same shall be referred to the adjudication of, three arbitrators, one to be nominated by the owner, the other by the contractor and the third by the President of the International Chamber of Commerce, in the case of foreign contractors and President of the Institution of Engineers, India, in the case of local contractors.'

Clause 85 pre-supposes one of the parties giving a written notice to the other regarding the existence of a dispute or difference in relation to the contract. It is only a dispute or difference of which notice was given by one party to the other, that could be referred to the adjudication of the arbitrators. The requirement as to giving of notice coupled with the use of the phrase 'the same' makes it crystal clear that a dispute other than the one notified to the department cannot go for arbitration. The reason is obvious. A dispute or difference could be said to arise only if one party makes the claim or demand and the other party repudiates or ignores it. There can be no dispute when the other party was not even apprised of

the claim. This is the conclusion which we reach on going through the precedential route as well, in Santokh Singh Arora v. Union of India, : AIR 1992 SC1809 , it was observed:

'In our opinion, the scope of the arbitration, in these proceedings, has to be confined to the disputes which were the subject matter of arbitration before the first arbitrator. It is not permissible for the appellants to raise new disputes in relation to damages claimed to have been sustained by him after the disputes have been referred to arbitration.'

In Major Inder Singh v. Delhi Development Authority, : [1988]3SCR351 , it was stressed that the existence of dispute is essential for appointment of an arbitrator under Section 8 or under Section 20 of the Act. It was observed:

'there should be a dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds.-----Whether in a particular case, a dispute has arisen or not, has to be found out from the facts and circumstances of the case.'

7. We are, therefore, of the view that the claim for damages at Rs. 6,99,016/- could not have been the subject matter of arbitration and no amount could be awarded under this head. If the arbitrators go beyond the scope of reference and sit in judgment over a non-arbitrable claim, it goes to the root of their jurisdiction. We are not sure whether any amount has been awarded at all under this head. If any such amount has been awarded, we would only say that it was not within the scope of the dispute referred to arbitrators and they did not have the jurisdiction to accept such claim.

Claim No. 1:

8. This claim is for escalation in rates and is based on Clause 60 of the general conditions of the contract. Clause 60 captioned as 'price adjustments' reads as follows:

'The details of owner supplied materials are given in Appendix '3'. Tenderers must quote their unit rates for finished work based on these prices. If there is any

change in the unit cost of these materials, the net amount of such increases or decreases in respect of the quantities of materials to which increases or decreases have become applicable will be adjusted in the contractors monthly bills.

In respect of the contractor-supplied material increase or decrease in the basic cost of diesel oil, lubricants and drill rods prevailing on 18-7-1977 will be adjusted in the contractor's bills.----'

We are concerned here with the increase in the owner-supplied materials, which are given in Appendix-3. These are cement, steal, gelatine, detanators, fuse coils etc. In the the annexure, the source from which the material was to be obtained, the issue rate per Metric Tonne/per Kg./per coil etc. and the rate, are shown. It is not the case of the contractor that the said materials were supplied to him over and above the stipulated 'issue rate' at any point of time. In fact, he is not asking for any extra payment on the owner-supplied materials as such. But, he is claiming an overall increase in the agreement rates based on the increase in price of owner-supplied materials. In other words, the contractor's contention is that the difference between the issue rate mentioned in the agreement and the actual price at the time of delivery of material shall form the basis for working out the percentage of increase or decrease of the amount payable for the work done by him. As and when there is increase in the cost of owner-supplied materials, no doubt, it will be borne by the Government. But, what the contractor says is that the percentage of increase of such material shall go to increase the overall contract amount payable to him under the bills. Admittedly, this claim is founded wholly and solely on the expression 'unit cost' occurring in Clause 60. It is the case of the contractor that the 'unit cost' spoken of in Clause 60 is not the same thing as the 'issue price/rate' occurring in Appendix-3.

9. While the learned Government Pleader submits that the claim is incongruous and not in accordance with the terms of the contract, the learned counsel for the respondent submits that the claim is in perfect conformity with Clause 60. The learned counsel further submits that even if it is a matter of interpretation of the relevant clause in the agreement, the conclusion reached by the arbitrators as a result of such interpretation, cannot be faulted on any of the grounds mentioned in

Section 30 of the Act. Reliance is placed on the observations made by the Supreme Court in Sudarsan Trading Co. v. Govt. of Kerala, : [1989]1SCR665 to the effect that:

'Interpretation of the contract is a matter for the arbitrator and on which the Court cannot substitute its own decision.'

The Supreme Court commented that:

'the High Court seems to have fallen into an error of deciding the question on interpretation of the contract.'

It was further observed:

'It may be stated that if on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view, though perhaps not the only correct view, the award cannot be examined by the Court in the manner done by the High Court in the instant case.'

The same proposition has been laid down in many other cases, viz., Hindustan Construction Co. Ltd., v. State of J & K., : AIR 1992 SC2192 and State of Rajasthan v. Puri Construction Co. Ltd., : (1994)6SCC485 . While we are quite conscious of this principle, we must remind ourselves of the equally well settled principle that the arbitrator should give effect to the contract and his jurisdiction is limited by the contract, vide State of A.P. v. Associated Engineering Co., AIR 1992 SC 234. Continental Construction Co. v. State of M.P., : [1988]3SCR103 and Ch. Ramalinga Reddy v. Superintending Engineer, 1994 (5) SCALE 67. Even in Sudarsan Trading Co. case, : [1989]1SCR665 , it was observed at para 30:

'An award which ignores express terms of the contract is bad.

' In Associated Engineering co. case, AIR 1992 SC 234, it was observed:

'An arbitrator cannot widen his jurisdiction while deciding a question not referred to him or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says.'

In that case also, the price adjustment clause was sought to be interpreted by the learned counsel appearing for the contractor in a particular manner so as to establish that the formula adopted by the arbitrator was in keeping with the terms of the contract. But the same was rejected by the Supreme Court holding that a different formula other than the one prescribed by the relevant clause in the agreement was adopted by the arbitrator and that amounted to the arbitrator exceeding his jurisdiction. It has also been laid down in a catena of recent decisions including Associated Engg. Co. case that it is permissible to look into the agreement and pleadings to determine whether the arbitrators decided a dispute beyond the scope of reference or otherwise exceeded their jurisdiction by going against the contract by which they are as much bound as the parties.

10. In this background, let us look at Clause 60 of the agreement. We will assume for the time being that there is no distinction between issue price and unit cost and both are interchangeable expressions. Then, what follows? Clause 60, in our view, is meant to cover two contingencies:

(1) Where there is an increase in the cost of the owner-supplied materials (at the time of delivery of material to the contractor) and the increased price has been charged.

(2) Where there is a decrease in the price of such materials compared to the issue price specified in the agreement.

In the first contingency, the contractor will be given credit in the monthly bills to the extent of the extra price charged. In the second contingency, the difference between the issue price and the actual price prevailing at the time of delivery will be deducted from out of the monthly bills. The reason for this adjustment is to be found in Clause 60 itself. It is stipulated therein that 'tenderers must quote their unit rates for finished work based on these prices' (issue rates). That means, the specified issue price of the owner-supplied materials was a component of tendered rates and the contractor or the department will get credit from the other depending upon whether there was increase or decrease. The price adjustment should be done as and when there is increase or decrease resulting in additional liability or additional benefit to the contractor, so that there may not be an

unintended loss or benefit to both the parties.

11. The plea of the respondent-contractor, as already noted above, is that the expression 'unit cost' employed in Clause 60 is not synonymous with issue rate/price. Whereas the issue rates are specified in Appendix 3, the unit cost represents the actual cost of material at a given point of time. If so, according to the respondent, the increase in the actual price of the material supplied to him irrespective of whether such price is charged to him or not, should result in proportionate increase in the overall rate for the quantity of work done. It is almost impossible to accept this contention. First of all, we find no dichotomy between the issue price mentioned in Appendix 3 and unit cost mentioned in Clause 60. The unit cost is no different from the issue price/rate specified in the Appendix 3. The word 'unit' is used obviously for the sake of brevity because the measure varies from material to material. For instance, in the case of steel and cement, it is Metric Tonne, in the case of Gelatine, it is per Kg. and in the case of fuse coils, it is per coil. By using the expression 'increase in the unit cost', it does not mean anything more than the increase in the issue rate. If, therefore, the contractor was charged at the issue rate only despite the increase in the cost of material, the question of adjustment does not arise at all. If the contention of the contractor that the percentage of the increase in the actual price of owner-supplied materials should result in the overall increase of rates is to be accepted, the relevant clause in the contract has to be re-written. We have to react something into the contract which is not there. Assuming for the sake of argument that the unit cost of materials denotes the actual price of materials at a given point of time of supply, even then, such increase could only result in adjustment in respect of those materials, but not increase in the agreed rates for the work as a whole. The words 'in respect of quantities of materials to which increase or decrease have become applicable' are significant and conveys beyond doubt that the increase in the price of material, if at all, should result in credit to be given to the contractor on notional basis only to the extent of such increase in the material supplied to him. That is the maximum which we can say in favour of contractor. We are of the undoubted view that Clause 60 cannot be regarded as a provision enabling general escalation in rates, based on the increases in the cost of owner-supplied materials. In this context, it is significant to note that the contract itself provides for escalation in regard to certain

items viz., labour escalation as per Clause 61, escalation for contractor-supplied materials as per second part of Clause 60 etc. When there are specific provisions in agreement in regard to escalation, Clause 60 (part I) cannot be dubbed as another escalation clause covering the entire gamut of the rate structure in the absence of plain words to that effect. Viewed from any angle, we must unhesitatingly hold that Clause 60 is not at all susceptible of the interpretation which the respondent wants to place on it. The language and intendment of the clause is sought to be distorted in the name of interpretation, in order to take an unintended advantage. While there can conceivably be no doubt and no other view is reasonably possible as regards the scope and meaning of Clause 60, the respondent by his own interpretation of 'unit cost' wants to create a doubt. We cannot but describe this attempt as speculative.

12. We would like to clarify that by analysing the relevant contractual provision and grasping its plain and incontrovertible meaning, we are not embarking upon a process of interpretation. We reach the conclusion that the contractor's interpretation is utterly untenable and incongrous, not so much by interpreting it, but by merely referring to it in order to see whether the-arbitrators were within their jurisdiction to award any amount on this account. That such approach is permissible is beyond doubt in view of the decision of the Supreme Court in Associated Engineering Co. case (6 supra). In that case, it was observed in para 23 :

'This conclusion is reached not by construction of the contract, but by merely looking at the contract.'

In Ch. Ramalinga Reddy v. Superintending Engineer (8 supra), their lordships of the supreme court referred to the relevant clauses in the agreement and concluded that there was no provision for extra rates for the work done beyond the agreement period. It was observed :

'The arbitrator was bound by the contract between the parties and to decide the claims referred to him in the light thereof. His award being found to be contrary to the plain terms of the contract, it was liable to be set aside to that extent.'

Referring to the argument that the Court should be very circumspect before setting aside an award made by the arbitrator, Bharucha, J. observed:

'We cannot agree, circumspection does not mean that the Court will not intervens when the arbitrator has made an award in respect of a claim which is, by the terms of contract between parties plainly barred.'

We are not at all certain that the arbitrators have awarded any amount under this claim by accepting the contractor's interpretation' on Clause 60. If they did, we must condemn that award saying that they had exceeded their jurisdiction and not merely committed an error of law.

13. The result of the above discussion is that the arbitrators should not have awarded any amount in respect of the two major claims put forward by the contractor. Considering the fact that the arbitrators awarded a sum of Rs. 3,30,200/- and the totality of the claim under the other three items is only Rs. 1.08 lakhs, the irresistible inference to be drawn is that the arbitrators should have awarded some amount against one or both of the aforementioned two claims. In such circumstances, in the normal course, we would have set a side the award and sent back the matter to the arbitrators for consideration of the other three claims. On hearing the learned counsel on this aspect, we are not inclined to adopt that course of action at this distance of time, especially when we cannot rule out the possibility of the other three claims having been accepted by the arbitrators. Both the learned counsel have agreed for a decision on the question whether these claims could have been upheld by the arbitrators. Hence, we consider it just and proper to give a finale to the controversy instead of entering into nicaties of entering into saverability of award and so on.

14. Now, coming to claim No. 2, the contractor claimed Rs. 27,422/- towards payment of storage charges for diesel oil. Under the second part of Clause 60, the contractor is entitled for escalation if there is increase in the basic cost of diesel oil. It is provided by Clause 60 that for the purpose of assessing the increase, the rates of increase or decrease of diesel oil and lubricants of Indian Oil Co. at departmental stores at Tekulapally oil depot shall be taken as the basis. It is also provided in the agreement that the basic cost of diesel oil includes taxes and

duties. The case of the contractor is that the basic rate quoted at the departmental stores, Tekulapally included storage charges. Thus, according to him, the price is all inclusive. But, storage charges were disallowed while passing the bills. It is contended in the counter-affidavit that the basic cost of diesel oil and lubricants includes taxes and duties, but not storage charges. This stand seems to be unreasonable. Merely because there is a specific mention of taxes and duties, it does not mean that the other components of cost should be excluded., At any rate, it is a matter of doubt on which two views can be taken. The arbitrators were well within their authority to award the amount claimed on this account.

15. The third claim for Rs. 67,007/- arises on account of unilateral change of the relevant clause in the agreement regarding diesel oil requirements. Admittedly, this change was brought about after the expiry of the contract period and the completion of work. A correction slip to the agreement was issued by the superintending Engineer on 12-2-81. There can be no doubt that such unilateral change in the agreement should not have been made by one of the contracting parties. The contention of the department is that at the time when the final bill was paid on 26-3-1981, the correction slip was not contested by the claimant. It is only five months thereafter the contractor contested. Whether the respondent is stopped from putting-forth the claim in this regard after receiving payment under the bill is a question turning on the merits of the case, which the arbitrators alone were competent to decide. Suffice it to observe that the claim put forward by the respondent in this regard is a question arising in relation to or in connection with the contract, which the arbitrators were empowered to decide. The amount, if any, awarded under this item cannot be said to be beyond the scope of the contract or the dispute referred to the arbitrators.

16. The last claim to be considered is claim No. 4. An amount of Rs. 6,394/-was claimed towards ascalation of labour charges based on the price index prevailing at the time of execution of the work which prolonged beyond the originally stipulated period. Clause 61 provides for compensation being paid to the contractor for increase in labour wages according to a formula. Whether the claim falls within the scope of this clause or not is a matter for debate. In the counter, the appellants have relied upon Clause 42 of the conditions of contract, which prima

facie, has no application because it speaks of untimely floods during the working season, which is not the case here. We are, therefore, of the view that the claim cannot be said to be outside the scope of the contractual terms and we find no legal impediment against the arbitrators allowing this claim.

17. We need not discuss claim No. 5 as the perusal of the award shows that the interest as claimed under this head was not awarded.

18. Lastly, we may refer to the contention of the learned Government Pleader that the City Civil Court in which the O.P. was filed is not a competent Court and, therefore, that Court should not have passed a decree confirming the award. It is submitted that the appellants who are the respondents in the claim petition were at all relevant points of time having offices at Khammam. The work was executed within the limits of Khammam district and the payment was also received by the respondent from the Khammam office of the appellants. Hence, it is submitted that the Court at Hyderabad has no territorial jurisdiction. The learned Govt. Pleader has invited our attention to the definition of Court under Section 2(c) of the Act. The expression 'Court' according to Section 2(c) means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit. Applying the test laid down in Section 2(c), the City Civil Court may not be a competent Court because it would be lacking in territorial jurisdiction. Nevertheless, this is a case where Section 21 of C.P.C. is attracted and the objection based on the absence of territorial jurisdiction, if tested on the anvil of Section 21 C.P.C. would lose its force. It may be noted that Section 41 of the Arbitration Act enables the provisions of C.P.C. to be applied to all proceedings before the Court and to all appeals under the Act, subject, of course to the provisions of the Act and Rules to the contrary. In view of Section 41, there is no legal hurdle to apply the principle enshrined in Section 21 of C.P.C. If so, we are of the view that the objection has to be overruled on the ground of absence of prejudice to the appellants. It is clarified by the Supreme Court in Pathumma v. Kuntalan Kutty, : [1982]1SCR183 that:

'In order that an objection to the place of suing may be entertained by an appellate or revisional Court, the fulfilment of the following three conditions is essential:

(1) The objection was taken in the Court of first instance.

(2) It was taken at the earliest possible opportunity and in case where issues are settled, at or before such settlement.

(3) There has been a consequent failure of justice.

All these three conditions must co-exist. Now in the present case conditions Nos.1 and 2 are no doubt fully satisfied; but then before the two appellate Courts below could allow the objection to be taken, it was further necessary that a case of failure of justice on account of the place of suing having been wrongly selected was made out. Not only was no attention paid to this aspect of the matter but no material exists on the record from which such failure of justice may be inferred.'

19. In the present case too, the last ingredient is not satisfied, because there is no failure of justice on account of suing in a Court not having territorial jurisdiction. It is significant to notice that the appellants themselves filed O.P. to set aside the award in the City Civil Court at Hyderabad. It shows that they are in no way prejudiced by the City Civil Court trying the suit or enquiring into the O.P. Moreover, the counsel for the appellants is not able to spell out that any prejudice could have possibly ensued to the appellants. We must say that there is no suggestion or hint of failure of justice as a result of the City Civil Court proceeding with the trial of the case. We, therefore, reject the contention advanced by the learned Govt. Pleader.

20. Accepting the claims 2,3, and 4 and proceeding on the basis that the amount awarded could have very well covered the said three claims, we declare that the respondent-contractor is entitled to get a sum of Rs. 1,00,823/- and the award shall stand amended accordingly. The direction in the award with regard to payment of interest at 10% per annum from 15-3-1982 will stand insofar as the above amount is concerned. The decree of the lower Court shall stand modified accordingly. The C.R.P. and C.M.A. are thus partly allowed, No Costs.