

State of U.P. Vs. M/S Allied Construction Engineers and Contractor

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Court : Allahabad

Decided On : Jan-24-1996

Reported in : AIR1996All295

Judge : R. Dayal and ;O.P. Jain, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 30 and 33; Minimum Wages Act

Appeal No. : F.A.F.O. No. 716 of 1994

Appellant : State of U.P.

Respondent : M/S Allied Construction Engineers and Contractor

Advocate for Def. : Manoj Mishra, Adv.

Advocate for Pet/Ap. : S.P. Srivastava, Adv.

Judgement :

ORDER

R. Dayal, J.

1. This appeal is directed against the judgment and decree dated 19-4-1994 passed by the 1st Addl. Civil Judge, Bulandshahr making award of the arbitrator a rule of Court in Suit No. 156 of 1994.

2. In pursuance of a contract bearing number K-02-036 dated 9-4-1990 between the parties, the respondent-contractor did some construction work for the appellant. The respondent raised a claim for the expenditure incurred by it on dewatering in respect of items 16 and 17 of the agreement by means of a letter dated 16-6-1992 addressed to the Superintending Engineer, Upper Ganga Canal Modernisation, II Division World Bank, for which the respondent did not receive any reply. Thereupon, the respondent preferred an appeal before the Chief Engineer and the same was rejected vide his communication dated 1-2-1993. Then the respondent made a request for referring the matter to arbitrator. Accordingly, the matter was referred to the arbitration of Sri Amar Singh Rajpoot, Superintending Engineer. The case of contractor is that dewatering was an extra work under items 16 and 17 and on this count he has incurred heavy expenditure for which the appellant is liable to pay. On the other hand, the case of the appellant is that nothing was to be paid on this count, as per the terms of the agreement.

3. Items 16 and 17 read as under:--

'16. Supplying and laying boulder in approach and sides including cost of all labour, material, lead & lifts and dewatering etc.

600 M'

Cum

Rs. 253.00(Rs. Two hundred fifty three only.)

17. Sheetpile driving with all labour, T& P. equipment, lead and lifts including cost of sheetpiles including de-watering etc.

25 MT

Metric Tonne

Rs. 10,900.00(Rs. Ten thousand Nine hundred only).

4. The arbitrator has in his award, taken note of the fact that tenders had been invited for items 16 and 17 including the work of dewatering. Even then, he held the work of dewatering as extra work relying upon Clause 10 of the general conditions of the contract which stipulates that in case there is any discrepancy between the technical specifications and schedule of quantities and bids, the technical specifications would prevail. In respect of item 17 technical specification No. 4.10 states as under:

4.10 : Dewatering if required shall be done with the permission of engineer-in-charge by contractor in working area, for which nothing extra shall be payable.

However, in technical specification No. 4.04. which gives particulars of rates, there is no mention of dewatering in respect of this item. As regards item No. 16 there is no mention of dewatering in the technical specifications at all. The arbitrator has also taken note of the fact that cost analysis which was prepared by the department at the time of inviting tenders did not include expenses on account of dewatering for items 16 and 17 but included the same in respect of some other items, i.e. items 1 and 3 which related to earth work in excavation and cement work in foundation, respectively, and this shows that the department was of the view that in respect of items 16 and 17 either dewatering was not required or if it was required the requirement would be minimal; for otherwise provision must have been made in the cost analysis for dewatering in respect of items 16 and 17 as well. The arbitrator has held that there being no mention of dewatering in technical specifications in respect of item 16, the contractor is certainly entitled to payment for dewatering in respect of that item. He has further held that there being no mention of dewatering in respect of item 17 in technical specification relating to rates, even though mention of dewatering has been made in technical specification in para 4.10, a situation of doubt has arisen, and this has been soon account of the failure on the part of the department to take full precautions in preparing the contract and, therefore, the contractor is entitled to take the benefit of the situation; but at the same time, since the contractor did not seem to have taken steps for removal of the situation of doubt before tender, both the parties were responsible for the same and, therefore, ends of justice would be met, if the expenses for dewatering were borne by both the sides equally. On that basis the

arbitrator has made the award.

5. In the application filed by the appellant under Sections 30 and 33 of the Arbitration Act one of the objections which is relevant for the purpose of this appeal is that the tenders had been invited in respect of items 16 and 17 for the entire works including the work of dewatering and as such the award is contrary to the terms of the contract and, therefore, the award is erroneous on its very face and by awarding the amount the arbitrator has misconducted himself and the proceedings. On the other hand, the contractor has taken the plea that the award is a well reasoned award rendered by an Engineer and is in accordance with the terms of the contract.

6. The learned trial Court held that the award could not be set aside on the ground that the arbitrator reached a wrong conclusion. He accordingly rejected the application under Sections 30 and 33 and made the award a rule of the Court.

7. We have heard learned Standing Counsel. Sri P.K. Bisaria, for the appellant and Sri Manoj Misra, learned counsel for the respondent-contractor. Sri Bisaria has submitted that the award is against the terms of the contract and, therefore, by awarding the amount for dewatering in respect of items 16 and 17 the arbitrator has misconducted himself and the proceedings and the award is erroneous on its very face. On the other hand, Sri Manoj Mishra has submitted that arbitrator is the sole Judge of the facts and law and the award cannot be set aside on the ground that it is erroneous and that once the matter was referred to arbitration, the question before arbitrator was one of interpretation of the contract which was within his jurisdiction and the award cannot be set aside on the ground that some other person could reach any other conclusion and has in support of his submissions relied upon *M/s K.N. Co-operative Dairy Farm Society Ltd. v. Union of India* : AIR 1973 SC1338 ; *State of Karnataka v. Shree Rameshwara Rice Mills Thiruthalli* (1987) 2 SCC 160 : (AIR 1987 SC 1359); *M/s. Sudarsan Trading Co. v. The Govt. of Kerala* : [1989]1SCR665 and *State of U. P. v. M/s. Harish Chandra and Co., Delhi*, 1995 (1) CRC 41. Thus the sole question for decision is whether the award is in violation of the terms of the contract and, if so, is it invalid ?

8. It was held in *Associated Engineering Co. v. Government of Andhra Pradesh* : [1991]2SCR924 that the arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it. 'Further, the Court said that an 'arbitrator who acts in manifest disregard of the contract acts without jurisdiction' and 'a dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award'. In that case several claims were made by the contractor in respect of which there was no specific provision for payment. Claim No. III was made towards escalation in the cost of nap slabs. Item No. VI was for payment towards extra lead for water regarding which item the contract had provided that the contractor would make his own arrangement for supply of water. Item No. IX was for extra expenditure incurred due to flattening of canal stopes and consequent reduction in top width of banks used as roadway. The contract provided that any other haul road required by the contractor and not specified in plan would be carried out by the contractor at his own cost. The Court held that the arbitrator had acted outside the contract in awarding these claims and, therefore, set aside the award regarding these claims. This was done by the Court on its own interpretation of the contract.

9. In *M/s. Tarapore & Co. v. State of Madhya Pradesh* : [1994]1SCR1012 the contractor made a claim for increase in the wages on the ground that after the contract was entered into, minimum wages were raised by the State and the appellant was required to pay wages at increased rates. The rate quoted by the contractor related to the wages as were prevalent at the time when the tender was invited. The revision of the wages upset all the calculations, as, extra amount had to be paid on this count. The question for decision before the Court was whether the arbitrators had acted in breach of the terms of the contract in awarding to the contractor for the increase in the wages and had, therefore, misconducted themselves. The Court held that for the increased payment on account of rise in

the rates of minimum wages the liability had arisen on account of the statutory obligation in view of the Minimum Wages Act, that the contract was silent about payment of minimum wages and that the parties were not in any sort of agreement express or implied to reimburse the same and so the contractor could not make claim for any such increase. However, as regards fair wages, the contract provided that the contractor would pay not less than fair wages and it has to be assumed that when the contractor was required to be paid fair wages at increased rates, the authorities did visualise that the contractor cannot do so by cutting down its profits. Further, by asking the appellant to give tender by taking into account the fair wages notified at the time of inviting tenders, the authorities did give an impression that fair wages to be paid would be the one then notified/prescribed. In such a situation if rates of fair wages have been raised afterwards, the tender sum cannot be taken to be agreed amount for completing the contract, in the face of the directions of the authorities requiring the appellant to pay wages at rates higher than those prescribed or notified at the time of inviting tenders. On this fact situation, it was held that the State had by necessary implication agreed to reimburse this increased payment. Accordingly the Court directed for the payment at that part of the enhanced rate of fair wages, which was, if at all, above the rate of minimum wages prevailing at the relevant time.

10. It would thus appear that duty of the arbitrator is to decide a dispute in terms of contract between the parties and if he decides in contravention of the terms of the contract, the award gets vitiated. The question as to whether or not the arbitrator had arbitrated in terms of the contract is one which is to be decided by the Court on its own interpretation and not on the basis of what the arbitrator had said on the question. When the arbitrator examines the terms of the contract to find out whether he should allow a particular claim as per the terms of the contract, he not only decides the dispute but also determines his jurisdiction and when he does so what he says is not final. The Apex Court has taken the view that the question as to whether the arbitrator has acted in breach of the terms of the contract is a question which is to be decided by the Court. In the present case, items 16 and 17 clearly provide that the rates were being invited for the entire work covered by those items including dewatering. When specific provision has been made in the items themselves, there is no question of there being discrepancy between the

terms stipulated in the items and the technical specifications, even though the latter did not provide for dewatering. This is a case where in respect of one item the schedule of quantities and bids clearly provided that dewatering was included in the work required to be done and there was no mention of dewatering at all in technical specifications. The fact that technical specifications were silent did not mean that the same were contrary to what was slated in the schedule of quantities and bids. The fact that in the cost analysis also there was no mention of dewatering in respect of this item, did not improve the situation. As regards the other item, the schedule of quantities and bids specifically include dewatering in the work required to be done and there is also specific provision in one para of technical specifications that nothing is to be paid extra for dewatering but there is no mention in technical specification relating to rates about it. The case in respect of this item is still the worse.

11. As regards the authorities cited by the learned counsel for the respondent he has relied upon para 12 of *M/s. K.N. Co-operative Dairy Farm Society Ltd. v. Union of India* : AIR 1973 SC1338 , which reads as under:

'12. Mr. Nariman, the Additional Solicitor General, appearing on behalf of the respondents also contended that the appellants having specifically stated that their claims are based on the agreement and on nothing else and all that the Arbitrator had to decide was as to the effect of the agreement, the Arbitrator had really to decide a question of law, i.e. of interpreting the document, the agreement of 6-5-53 and his decision is not open to challenge. We agree with him : See the decision in *Durga Prasad v. Sewkishendas and Ghylam Jailani v. Muhammad Hassan*, (1901) 29 Ind App 51 (PC)'.
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Undoubtedly, when a question of law is referred specifically for decision of arbitrator, the decision of the arbitrator on that question of law is final. However, where a dispute is referred to the arbitrator it has to be decided in terms of the agreement and not in disregard thereof. It cannot be said that any question of law was referred to the arbitrator in the present case keeping in view the later decisions of the Supreme Court referred earlier.

12. In this State of Karnataka v. Shree Rameshwara Rice Mills, Thirthahalli (AIR 1987 SC 1359) (supra), the respondent was in terms of Clause 12 of the agreement liable to pay damages to the appellant as might be assessed by the appellant. The question for decision was whether under that clause the appellant was entitled to adjudicate upon a dispute regarding breach of conditions of the contract. It was held that the power to assess damages is a subsidiary and consequential power and not the primary power and it cannot be assumed that the right to adjudicate upon an issue relating to breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. It was observed that it is clear that right of the appellant to assess damages would arise only if the breach of the conditions is admitted or if no issue is made of it. It was also observed that a party to the contract could not be an arbiter in his own cause and that interests of justice and equity require that where a party to a contract disputes the committing of any breach of the conditions the adjudication should be by an independent person or body and not by the other party to the contract. We fail to appreciate how this authority supports the respondent. The submission of the appellant is not that the question as to whether the arbitrator had acted in breach or in contravention of the terms of the contract is to be decided by it, but that the question whether the claim of the contractor is entitled to be entertained by the arbitrator in terms of the contract is to be decided by the Court, since the contractor cannot arbitrate the disregard of the provisions of the contract.

13. The other authority relied upon by the learned counsel for the respondent is M/s. Sudarsan Trading Co. v. Government of Kerala : [1989]1SCR665 (supra). It was observed in para 32 that it is not a correct proposition of law to say that it is possible for the Court to construe the terms of the contract to come to a conclusion whether an award made by arbitrator was possible to be made or not. In para 33 the Court said that an arbitrator deciding a dispute under the contract is bound by the contract. However, the Court cannot substitute decision of the arbitrator as to what was meant by the contract, once that dispute was conceded to the arbitrator. This observation is to be read in the light of later decisions of the Apex Court referred earlier and so read the legal decision is that if the arbitrator acts in contravention of the provisions of the contract his award is vitiated and this

question is to be decided by the Court.

14. The last authority cited by the learned counsel for the respondent is State of U. P. v. M/s Harish Chandra and Co., Delhi, (1955 (1)CRC 41) (supra) where the well known general principle is reiterated that the arbitrator is the sole Judge of the quality as well as the quantity of the evidence and it is not for the Court to take upon itself the task of being a Judge of the evidence before the arbitrator. Further, it is said that when the arbitrator, who is Engineer himself on interpretation of the agreement and tendered items, considered the nature of the work and found that there is extra work not covered under the tendered item for which it granted rate is found to be reasonable, it is not possible for the Court to interfere with the same since reasons appear to be reasonable. This observation reiterates the law in general and does not deal with the question as to the validity of the award which has been rendered in disregard of the provisions of the contract.

15. After careful consideration of the rival contentions of the learned counsel for the parties and also the relevant authorities, we are of the view that where an arbitrator acts in disregard of the provisions of the contract, he misconducts himself and the proceedings his award is vitiated by illegality has to be set aside. The question whether the arbitrator has acted in contravention of the provisions of the contract is one that has to be decided by the Court on its own interpretation without being influenced by what the arbitrator has said on the subject. We hold that the award in this case is vitiated inasmuch as items 16 and 17 of the schedule of bids and quantifies clearly stipulate that the rates tendered by the contractor were inclusive of the work of dewatering. In view of this specific provision in the contract, the question was not one of interpreting the contract but was of mere looking at it.

16. Accordingly, we allow the appeal and set aside the impugned judgment and decree dated 19-4-94 of the trial Court and also the award of the arbitrator. In the circumstances there shall be no order.

17. Appeal allowed.

