

Narmada Constructions Vs. Western Coalfields Ltd.

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Court : Madhya Pradesh

Decided On : Jan-03-2008

Reported in : 2008(4)ARBLR246(MP)

Judge : Arun Mishra and ;Sanjay Yadav, JJ.

Appellant : Narmada Constructions

Respondent : Western Coalfields Ltd.

Disposition : Appeal dismissed

Judgement :

Arun Mishra, J.

1. The appeals have been preferred by the contractor aggrieved by order dated 21.02.2002 passed in Civil Suit Nos. 18/2001 and 19/2001 refusing to modify/set aside separate awards passed by arbitrator on 26.03.1997.
2. Facts are being referred from MA No. 1065/2002 as it is conceded at bar that decision of MA No. 1065/2002 would decide the issue raised in MA No. 1063/2002 on factual and legal aspects both.
3. The contractor was given work of construction of quarters pursuant to tender dated 15.05.1990, an agreement 13/91-92 dated 02.01.1992 was entered into between the parties, cost of construction work was Rs. 2,35,26,072.30, the period

of completion of work was 18 months. The Western Coalfields Ltd. (hereinafter referred to as 'WCL') was required to supply cement, electricity and coal for manufacturing of bricks. It is also not in dispute that as per contract the work could not be completed within 18 months, period of 57 months was extended as per several orders, in spite of that work was not completed, the contractor abandoned the work on the ground that WCL has failed to carry out the obligation to supply cement, electricity and coal. Prayer was made before the District Court on 15th March, 1996 to appoint an arbitrator in terms of agreement dated 02.01.1992. As per order dated 01.10.1996 the court appointed the arbitrator, award was passed by the arbitrator on 26.03.1997, award in favour of WCL was passed for a sum of Rs. 2,70,08,114.56. WCL applied for making the award rule of the court whereas the contractor filed objections under Section 34 read with Section 20 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996'). The District Court set aside the award as per order dated 09.08.1997. Said order was assailed in this court by way of filing MA Nos. 1190/1997 and 1191/1997. The appeals were allowed, decision rendered by the District Court was set aside and it was held by this court that arbitrator had the jurisdiction to entertain the counter-claim filed by WCL, it was also held by this court that Act of 1996 was applicable as such the case was remitted to the District Court to hear and decide it afresh, thereafter impugned orders have been passed on 21.02.2002, award has been held to be executable in view of Section 36 of Act of 1996, objections preferred by contractor have been dismissed, aggrieved thereby the contractor has come up in appeals in this court.

4. Shri V.R. Rao, learned senior Counsel, has submitted that Act of 1996 was not applicable, arbitration Clause was invoked before the Act of 1996 was made applicable, thus, counter-claim was not included within the connotation of dispute between the parties, thus, it was not permissible to entertain the counter-claim and render a decision thereupon. The appeal has been preferred under the Arbitration Act, 1940, in case the Act of 1996 is held applicable, appeal be treated as appeal under Section 37 of the Act of 1996. In that case it would be defect of labelling the appeal under the appropriate provision of the Act. On merits, he has further submitted that the arbitrator has erred in law in not allowing the loss of profit and infructuous expenditure. On the items which were not included under the

escalation clause, escalation ought to have been granted as there was delay on part of WCL in carrying out the obligation under the agreement. There was failure to supply coal (ROM) for manufacture of bricks, thus, the claim made by the contractor has been wrongly rejected by the arbitrator. For allowing counter-claim, no reasons have been mentioned by arbitrator, it was necessary to pass a reasoned award as per Clause 13 of the agreement. There was no order of the competent authority passed with respect to levy of penalty of 10% as provided in Clause 6.2 of the agreement. Thus, it was not permissible to invoke the penalty clause, the counter-claim allowed by arbitrator on that count deserves to be set aside. He has also submitted that interest has been awarded on late payment of running bills, labour escalation has also been awarded by the arbitrator, there was failure to supply the cement and only on two occasions the contractor was permitted to utilize the cement issued for other work to the contractor by WCL. Contractor was not allowed to purchase the cement at the higher cost from the market, thus, there was failure on part of WCL to provide cement, coal as well as electricity, thus, loss of profit claimed by the contractor ought to have been awarded by the arbitrator including the other claims which were rejected.

5. Shri Greeshm Jain, learned Counsel appearing for WCL, has submitted that in Clause 3 of the special terms and conditions, cement was to be supplied by WCL 'if available'. Relying upon General Terms and Conditions Clause 7 he contended that it was obligatory upon the contractor to purchase the material from the market in case it was not available or supplied by the department. He has also attracted attention of this court to the finding recorded by arbitrator that cement was available continuously after September 1993 onwards, still thereafter the contractor failed to carry out the work, whatever escalation was permissible under the escalation Clause was awarded, it was rightly disallowed for the items which were not covered under the escalation Clause provided in the agreement. The question of availability of cement and availability in market has been considered by arbitrator and thereafter decision has been rendered, no permission of WCL was required to purchase the cement from the market, penalty Clause was rightly invoked and no proof was required so as to invoke the penalty Clause for which proposition he has relied upon decision of Apex Court in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. : [2003]3SCR691 . He has submitted that

penalty was rightly imposed under Clause 6.2 of the agreement. With respect to scope of interference in the findings recorded by the arbitrator, he has relied upon the decision of Apex Court in *McDermott International Inc. v. Burn Standard Co. Ltd. and Ors.* : (2006)11SCC181 . He has submitted that it is only in case of patent illegality and if the same goes to the root of the matter and a public policy violation should be so unfair and. unreasonable as to shock the conscience of the court, the public policy is a matter dependent upon the nature of transaction and the statute, consequently no case for interference is made out in the appeals.

6. For appreciating the submission as to loss of profit and delay raised by Shri V.R. Rao, learned senior Counsel, it is necessary to consider the question with respect to availability of cement first. The arbitrator has dealt with the question in para 6.4.2 of the award and held that department did not make an absolute commitment to supply cement and has agreed to supply cement only 'if available' at the colliery stores/area stores. The question of failure to supply the cement has also been considered in para 6.5.1 of the award and on due consideration of the case, relevant documents produced by the parties, cement registers, etc. the conclusion has been recorded in para 6.5.1.6 of the award to the effect that there was no shortage of cement during the year 1994. From the site cement register also it has been safely concluded that there was no shortage of cement from September 1993 onwards. It has also been held by the arbitrator that as there was no absolute commitment to supply the cement, consequently it was for the contractor to prove that he made an effort to purchase the cement from the market but failed to purchase it for the reasons beyond his control. The arbitrator has also found that working drawings were made available though no specific records were maintained. The finding recorded by the arbitrator is based on documentary evidence with respect to availability of cement and consideration of the various Clauses of the agreement. Clause 3 of Special Conditions of Agreement provides that cement was to be supplied 'if available'. Clause 3.2.0 of special conditions is quoted below:

3.2.0. Cement, if available, will be issued by the department to the extent required for the work from the colliery/area stores on sale account and recovery will be made thereof from the running on account bills.

The quantity of cement required for the work should be indicated in the offer which will be examined as to its reasonableness and accepted by the management. The issue of cement will, however, be as per actual requirement, not exceeding the quantities indicated in the offer and accepted. Transportation of cement from the place of issue to the site of work and proper storage or account of the cement at site shall be the contractor's liability. He should maintain proper register of cement received at site and particulars of consumption on day-to-day basis. The register and the cement stores shall be opened for inspection of the Engineer-in-charge or his authorised representative at all times. The contractor should draw cement on the basis of actual requirement during the period and avoid excessive drawal and storage at the site. Misuse of cement, unauthorised shifting of the materials from one place to another, etc. shall not be resorted to and if such instances are noticed, the Engineer-in-charge will be at liberty to impose recovery of such quantity of cement at double the specified rates and also to take such other disciplinary action as may be deemed fit.

In general terms and conditions also supply of material has been dealt with. Clauses 7 and 7.1 are relevant. Clause 7 provides that the contractor shall at his own expense, provide all materials required for the work and the rates quoted by the contractor shall be for finished work inclusive of all materials required for completion of the work. Clauses 7 and 7.1 of general terms and conditions are quoted below:

7. Supply of materials- The contractor shall at his own expense, provide all materials required for the work and the rates quoted by the contractor shall be for finished work inclusive of all materials required for completion of the work as specified in the contract. The company may, of its own or at the request of the contractor, supply such materials as may be specified, if available, at rate/rates to be fixed by the Engineer-in-charge.

7.1. For the materials which the company has agreed to supply for the contract, the contractor shall give in writing of his requirement in accordance with the agreed phased programme to the Engineer-in-charge sufficiently in advance. The value of materials so supplied shall be set off or deducted from the payment to be

made for the items of work in which such materials have been consumed, or from any sum then due or to become due to the contractor thereafter.

We are not inclined to accept the submission with respect to short supply of cement and thereby causing obstruction/delay in completion of work on part of WCL for various reasons referred to by the arbitrator, particularly that cement was available after September 1993 and throughout in the year 1994, still the work was not completed by the contractor and there was no absolute obligation upon the WCL to supply the cement, it was subject to 'availability' and there was shortage of cement for some time has been considered by the arbitrator, that was the stand of WCL also. In spite of availability of cement after September 1993, as found by the arbitrator, work was not completed, thus, it has material bearing on the claim made by contractor with respect to loss of profit. The reason assigned for not completing the work was that there was short supply of cement, the point has been dealt with by the arbitrator, and it could not be shown that findings recorded by arbitrator were perverse or illegal. Even if two interpretations of the Clauses of agreement were possible and the one interpretation has been adopted by the arbitrator, that would not be a ground to make interference in the awards passed by the arbitrator as it could not be said to be a misconduct committed by the arbitrator.

7. We are not impressed by the submission of Shri Rao that interest on the delayed monthly payment has been awarded by the arbitrator on running account bills, thus, work could not have been completed within the specified time by the contractor due to delay in payment of running bills. It is clear that stipulated period was 18 months and time period was extended for 57 months, still there was failure on the part of contractor to complete the work on flimsy ground. Merely by the fact that on delayed payment of some of the running account bills interest has been awarded by the arbitrator cannot be said to be affecting the finding of arbitrator in any manner that contractor was not entitled for loss of profit due to failure on part of respondent to provide cement or other items.

8. With respect to non-supply of coal (ROM), the question has been considered by the arbitrator in para 8.2.4 of the award. While considering the question, the arbitrator has relied upon documents C/96 and C/103, it was mentioned by the

contractor that 45 lakhs bricks were damaged, in both the occasions loss was reported due to untimely rains. Documents in relation to supply of coal C/59, C/60, C/94, C/95, C/96, C/98, C/99, R/13, C/101, C/102, C/103, C/120, R/22 and R/25 have been referred to by the arbitrator. It has also been considered that while seeking extension of time also the contractor did not bring out this aspect nor did ask for payment of damages. Thus, a considered decision has been taken by the arbitrator with respect to claim of Rs. 24,76,000 made on account of failure to issue coal (ROM) for manufacturing of bricks, that is also found to be proper, consequently loss of profit could not be claimed due to failure of supply of coal (ROM) by the WCL.

Thus, we have no hesitation in rejecting the submission of Shri Rao that for loss of profit, the contractor should have been awarded the amount due to failure of respondent to supply coal and cement. With respect to electricity, objection has not been pressed by Shri V.R. Rao, Senior Advocate appearing for contractor.

9. The second submission raised by Shri Rao that interest ought to have been allowed on loss of profit does not survive in view of our decision rendered with respect to loss of profit. Contractor has not been held entitled for loss of profit, consequently no question arises for award of interest.

10. With respect to escalation, it is not in dispute that escalation Clause was contained in special conditions. Clause 1.1 provided for escalation, escalation was provided on labour, steel and royalty, on other items escalation was not provided, thus, we have no hesitation in rejecting the submission of Shri Rao that on other items escalation should have been awarded which are not covered under the escalation clause. It is settled law that when escalation Clause provides for escalation of certain articles, it has to be provided only for those articles, allowing it on other articles not covered by it would be violation of the clause. Escalation wherever was permissible under the escalation Clause has already been awarded by the arbitrator is not in dispute. Thus, we have no hesitation in rejecting the submission that escalation ought to have been allowed even on the items which are not provided in the escalation clause.

11. Coming to the submission raised by Shri Rao with respect to award of infructuous overhead, he has relied upon decision of Apex Court in *Dwaraka Das v. State of M.P. and Anr.* : [1999]1SCR524 . The question has been dealt with by the arbitrator in para 8.2.5 of the award. The criticism made by Shri Rao that wrong reason was assigned that there was no provision for compensating infructuous overheads it could not be said to be a reason in the eye of law. Even if we accept the aforesaid submission, there are other reasons provided and discussed in various other paragraphs, with respect to loss of profit also discussion made has the effect on claim of contractor of infructuous overheads and termination of contract has not found to be illegal. It was a case of abandonment of work by the contractor on the ground that cement/coal and electricity were not made available, that question has been examined by the arbitrator and by this court and we agree with the finding recorded by the arbitrator that there was no such failure on part of WCL and the finding recorded by the arbitrator being based on facts is not amenable for interference in the light of decision of Apex Court in *McDermott International Inc. v. Burn Standard Co. Ltd. and Ors.* (supra) where Their Lordships of the Apex Court have considered the scope of interference under the Act of 1996. In *Dwaraka Das v. State of M.P. and Anr.* (supra) the termination of contract was found to be illegal. In the instant case, ratio of decision cannot be invoked as the contractor has abandoned the work and did not complete it in spite of several extensions of time granted to him to complete the work.

12. Coming to the objection vehemently raised by Shri Rao with respect to allowing counter-claim made by WCL by the arbitrator. He has submitted that what has been awarded in the form of Rs. 3,40,421.37 is the amount to be recovered for completing the remaining work and the Engineer-in-charge has submitted the above figure, in fact no debitable agency was employed as such aforesaid amount could not have been awarded. The submission by Shri Rao is incorrect on facts and is legally untenable. The aforesaid aspect has been considered by the arbitrator in paras 8.3, 8.3.1, 8.3.1.1, 8.3.1.2, 8.3.2, 8.3.2.1 is quoted below:

8.3. Claims of Western Coalfields Ltd. (respondents)- Claims dealt below are from the order referring the dispute to the arbitrator, claimants pleaded that these are

not arbitrable. However, in view of issues stated in paragraph 8.1.1 the arbitrator has considered these claims.

8.3.1. Claim No. 1- Rs. 3,40,421.37 for additional cost for engaging debitale agency for completing and finishing 45 Nos. MQs.

8.3.1.1. This claim is according to Clause 10.2, page 22. Respondents have filed copy of work order and R.A. Bills of the agency through which the work is done.

8.3.1.2. Clause 10.2(c) authorises Engineer-in-charge to determine the amount to be recovered for completing the remaining works and the Engineer-in-charge has submitted above figure.

This claim is, therefore, allowed for Rs. 3,40,421.37.

8.3.2. Claim No. 2- Rs. 75,93,895.03 for additional cost for engaging debitale agency for constructing 153 MQs, 48 B type and 2 Nos. C type Qtrs.

8.3.2.1. The respondents have not engaged any agency up to now for completing these quarters when over a year has already passed since closure of contract. Though no time limit has been specified in the agreement respondents cannot keep the option under Clause 10.2(c) open for an unlimited time. Respondents have not presented any documents to support that they have engaged another agency to complete the work or have started the work departmentally.

It is apparent that the arbitrator awarded a sum of Rs. 3,40,421.37 as 'cost for engaging debitale agency' for completing and finishing the remaining part of the work and an amount of Rs. 75,93,895.03 claimed by WCL as additional cost to be awarded, due to debitale agency has been disallowed. Thus, the submission raised by Shri Rao is not acceptable that for completing the remaining part of work the aforesaid sum has been awarded, obviously debitale agency has to be employed, the cost of employing debitale agency has been awarded, that is proper and based on Clause 10.2(c) of the agreement. Thus, arbitrator did not commit any misconduct while awarding the aforesaid amount.

13. Shri Rao has also seriously assailed the award of Rs. 23,52,607.22 by the arbitrator towards the penalty for leaving the work incomplete and unfinished, the aforesaid amount is 10% of the award value of Rs. 2,35,26,072.30. Clause 6.2 of the General Terms and Conditions of Agreement provides for imposition of aforesaid penalty in case work is left incomplete. Clause 6.2 is quoted below:

6.2. In the event of the contractor's failure to comply with the rate of progress as per the agreed time and progress chart, the contractor shall be liable to pay as compensation @ 1% of the contract value of the said part of the work as per work that the balance quantity of the said part remains incomplete. The aggregate of such compensation/ compensations shall not exceed 10 per cent of the total value as shown in the contract.

The company may at its sole discretion, waive the payment of compensation on request received from the contractor if the work is completed within the date as specified in the contract or as validly extended without stipulating any penalty.

In view of the discussion made on the factual matrix of the case, it cannot be said that award passed by the arbitrator is bereft of reasons, the work was left incomplete for which contractor was responsible, it was not a case of illegal rescission of contract by WCL. Consequently, the awarded amount is found to be in tune with the aforesaid Clause 6.2 of the agreement. The submission made that aforesaid amount should not have been allowed on the ground that additional rent which was incurred for housing of the employees was not awarded by the arbitrator, that was de hors of agreement and was an independent claim whereas penalty Clause is different, it has been rightly invoked and thus no dent was caused due to rejection of Claim No. 4 of house rent in the award of penalty.

14. The submission raised that the provisions of the Act of 1996 were not applicable as arbitration Clause was invoked before the Act of 1996 came into force. There is decision rendered inter se in same matter in MA No. 1190/1997 and MA No. 1191/1997 decided by this court. Division Bench of this court in Western Coalfields Ltd. Nagpur v. Narmada Constructions, Jabalpur 1999 (1) MPLJ 55 has held thus:

15. Coming to the merits of the claims learned Counsel submitted that the court below proceeded illegally as an appellate court has observed that the arbitrator has not considered the defaults made by the appellant resulting in abandonment of the contract by the respondent. The approach is erroneous, therefore, the award be made rule of the court. We are not inclined to express our opinion at this stage as the grievance of the respondent is that the court below has not dealt with other legal questions and also factual aspects which the arbitrator has failed to take a note, besides the alleged bias of the arbitrator. In the circumstances, this court is of the opinion that the cases should go back to the court below to decide the objections of the parties on the applications under Sections 34 and 36 of the Act of 1996 afresh in accordance with law after hearing the parties.

In view of the decision inter se parties in the same matter that has attained finality, it is not open for this court to reopen the aforesaid question, the decision is binding. Even otherwise on merits, we have examined the case, even if the provisions of Act of 1940 are held to be applicable, appeal has been filed under Section 39 of the Act of 1940 and it is not in dispute that scope of appeal under Section 37 of the Act of 1996 is wider then there would be a difference of scope of appeal and we have adjudicated upon the merit of the case.

15. Coming to the submission raised by Shri Rao that counter-claim was not covered within the ambit of connotation of dispute, this question has also been settled inter se in previous MAs between parties in *Western Coalfields Ltd. Nagpur v. Narmada Constructions, Jabalpur* (supra). This court has held thus:

10. When on an order of reference the arbitrator was appointed and for deciding all disputes the claims and counter-claims were sent to the arbitrator by the Chairman-cum-Managing Director there was no option for the arbitrator but to decide the claims and counter-claims based on the cause of action. As it was the duty of the arbitrator to adjudicate upon claims and counter-claims before making the award otherwise he would have misconducted himself.

11. Part I of the Act of 1996 deals with arbitration of which Chapter I relates to general provisions. Section 2 of the Act of 1996 in Chapter I of Part I is a 'definitions' provision, Sub-section (9) of Section 2 reads thus:

2. xxx xxx xxx(9) Where this Part, other than Clause (a) of Sub-section (2) of Section 32, refers to a claim, it shall also apply to a counter-claim, and where it refers to a defence, it shall also apply to a defence to that counterclaim.

From a bare reading of Sub-section (9) of Section 2 it is clear that counter-claims are equally arbitrable as claims. It will not now be open for a claimant to raise a controversy that a counter-claim is not entertainable by an arbitral tribunal. The law so far was not different under the Act of 1940. Where the claimant goes before the arbitrator with a set of claims, and the other party resists by filing counterclaims or advances counter-claims, if there be any, it is the duty of the arbitrator to consider both claims and counter-claims before making the award otherwise the arbitrator misconducts himself. See the decision of Supreme Court in K.V. George.

12. Therefore, there is no foundation in the contention that the arbitrator has exceeded his authority in travelling outside the powers conferred upon him by the reference by entertaining the counter-claim and adjudicating the same unless the two parties join in making a combined reference or the appellant also ought to have applied for reference about its claim in dispute to be decided under arbitration clause. The decisions relied on by the learned Counsel for the respondent are distinguishable which nowhere lay down that in a reference on the dispute between the parties in relation to claim if the counter-claim is lodged by the other party that would mean enlarging the scope of the reference and beyond the competence of the arbitrator.

In view of aforesaid decision, it is not open to re-agitate the aforesaid question and counter-claim had been specifically referred for adjudication is also clear.

16. Coming to the last objection raised by Shri Rao as to the cost of arbitration proceeding, there is an order of Managing Director passed in that regard that cost shall be borne by the parties equally, that order is binding upon the arbitrator, he could not have travelled beyond that order, thus, the order of arbitrator with respect to cost also does not call for interference in appeal.

17. It is conceded that fate of MA No. 1065/2002 to govern the fate of MA No. 1063/2002.

18. We find no merit in both the appeals, the appeals are hereby dismissed.

19. However, we leave the parties to bear their own cost as incurred of the appeals.

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