

G.D. Engineering Construction Vs. H.P. Board Pvt. Ltd. and ors.

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Court : Himachal Pradesh

Decided On : Oct-14-2008

Reported in : 2009(1)ShimLC24

Judge : Sanjay Karol, J.

Appellant : G.D. Engineering Construction

Respondent : H.P. Board Pvt. Ltd. and ors.

Judgement :

Sanjay Karol, J.

1. By filing the present objections under Section 34 of the Arbitration and Conciliation Act, 1996, the claimant M/s G.D. Engineering Construction, a proprietorship concern has assailed the award dated 22.6.2004 passed by Shri S.S. Juneja, Arbitrator, who entered upon the reference made by this Court vide order dated 23.5.2002.

2. The challenge is on the ground that while passing the award the Arbitrator has applied his personal knowledge and thus misconstrued and misread the provisions of the contract; settled principles of equity, fair play and natural justice have been violated as adequate opportunity to plead the case was not permitted; the award is contradictory, inconsistent and is based on surmises and conjectures.

3. This Court on 21.6.2006 framed the following issues for adjudication of the present objections filed under Section 34 of the Arbitration and Conciliation Act, 1996:

1. Whether the impugned award dated 22.6.2004 is in conflict with the public policy of India or the provisions of the Arbitration and Conciliation Act, 1996 and therefore, liable to be set-aside? O.P.-Objector.

2. Relief.

4. For the purpose of convenience, the objector/claimant M/s G.D. Engineering Company proprietorship concern of Sh. G.D. Dhiman is referred to as the contractor and M/s H.P. Board Private Limited respondent No. 1 is referred to as the Company and respondent No. 2 Sh. Randip Singh, Director of respondent No. 1, is referred to as the Director.

5. Brief facts necessary for adjudication of the present petition are that for the purpose of construction of factory shed at Tehaliwal (Bathu) in District Una, H.P., the Company floated tenders and invited offers from public. Pursuant to an advertisement dated 26.2.1998, the contractor vide letter dated 9.3.1998 submitted his tender expressing his willingness to execute the work.

6. The Director accepted the earnest money in the shape of Fixed Deposit and vide letter dated 23.4.1998, the Company awarded the work to the Contractor who was asked to immediately commence the work, to be executed in two stages, Phase-I envisaged the construction of utility area, factory shed including administrative block and security block, to be completed within the period of 2 - 3 months and the second phase was to be completed, in terms of the approved lay out within a period of six months from the date of the award of the contract. Out of total contract value of Rs. 82,32,239.70, works to be executed in the first phase was Rs. 54.00 lacs.

7. It appears that necessary statutory permissions were not received and the work site could not be handed-over to the Contractor to enable him to commence the work within time as envisaged in the contract letter. The statutory sanctions

eventually came on 5th September, 1998 and the contractor expressed concerns about escalation which were being looked into by the Company as the Contractor deployed material, staff and machinery for the execution of the contracted work but, however, no work could be commenced as certain disputes arose between the parties.

8. On the asking of the Contractor, this Court referred the disputes to the Arbitrator. The Arbitrator entered the reference on 27.06.2002 and inspite of sufficient opportunities afforded to the Company it failed to cause appearance and plead its case and hence was proceeded ex-parte. However, the Director not only caused appearance and defended the Contractor's claim but also filed counter-claims.

9. After affording due opportunity of hearing and enabling the parties to plead and prove the case, the Arbitrator passed the award.

10. The Director raised certain preliminary objections which stood decided by the Arbitrator as under:

1. Preliminary Objection No. 1: Whether there is any agreement and/or Arbitration clause.

Finding: Referring to and relying upon the decision of the Apex Court in Indian Hotels Co. Ltd and Ors. v. Income Tax Officer, Mumbai and Ors. : [2000]245ITR538(SC) as also the correspondence exchanged between the parties, the Arbitrator held that the contract between the parties stood concluded and as such, the parties were bound by the same. The Arbitrator had the jurisdiction to adjudicate the disputes.

2. Preliminary Objection No. 2: Director cannot be arrayed as party and the claim was barred by limitation.

Finding: The Arbitrator held that since the Director was concerned with the affairs of the Company also the owner of the land on which the works were to be executed, therefore he was rightly arrayed as a party. On the issue of limitation, referring to and relying upon the decision of the Apex Court in State of Orissa and

Anr. v. Damodar Das : AIR 1996 SC942 , it was so held that the claims were within a period of limitation.

3. Preliminary Objection No. 3: No sufficient cause for commencement of arbitration and claim.

Finding: The Arbitrator held that failure on the part of the Company to have handed over the site by itself was a sufficient cause, necessitating invocation of the arbitral proceedings and raising claims against the company.

11. Significantly, the Arbitrator held the Company to have committed material breaches of the contract in as much as (i) it prevented the execution of the work by delaying in handing over of the complete site (ii) not finalizing the lay out plan (iii) not issuing the relevant material i.e. cement, steel etc as stipulated in the contract (iv) wrongly forfeiting the earnest money without any sufficient cause or prior notice (v) Rescinding the contract without any sufficient cause, notice or assigning reasons and (vi) not taking adequate measures in ensuring early sanctions from the statutory authorities.

12. Importantly, the Company or the Director have not assailed any of the findings of the Arbitrator by filing a separate petition under Section 34 of the Act. The same are, therefore, binding on them.

13. With regard to the claims of the Contractor, the Arbitrator awarded as under:

Claim No. 1 as made by the Contractor Awarded by the Arbitrator

Part I Staff Rs. 6,38,000.00 Rs. 23,600.00Part II Machinery and vehicles Rs. 1,97,600.00 -NIL-Part III Labour Rs. 3,60,000.00 Rs. 12,000.00Part IV Loss of profit Rs. 13,72,000.00 Rs. 2,04,000.00Part V Earnest money Rs. 5,72,000.00 Rs. 1,00,000.00Part VI Exp. in accepting tender Rs. 5,789.00 -NIL-Total Rs. 31,45,389.00 Rs. 3,39,600.00CLAIM No. 2 COST OF REFERENCES:

As against claim of Rs. 40,000, the Arbitrator awarded Rs. 5,000.CLAIM No. 3 INTEREST:Interest @ 10% per annum from 01.05.1999 upto the date of the award only for claim No. 1 and further @ 10% from the date of the award till actual

realization of the amount was awarded by the Arbitrator.

14. In so far as the objection with regard to violation of principles of equity, fair play and natural justice is concerned, I am afraid that nothing has been shown to substantiate the same. On the contrary, the award reflects that the Arbitrator has taken extra caution in giving repeated opportunities to the parties to Cause appearance, file their claims/counterclaims and produce material in support of their claims. The Arbitral proceedings continued for more than 11 hearings and on each date consent orders were passed. The contention, therefore, needs to be rejected. The principles of natural justice stand fully complied with.

15. The objection that the award was passed on the basis of personal knowledge and material relied upon behind the back of the Contractor also needs to be rejected for the reason that nothing has been shown as to in what manner and which material did the Arbitrator rely upon to arrive at its conclusion. During the course of the hearing Mr. Dadwal, learned Counsel for the Contractor, however, narrowed down his submission to contend that while awarding damages for loss of profit, by applying guess work, the Arbitrator awarded profits to the extent of only 4%. I shall deal with this later.

16. The submission that the award is inconsistent and is based on surmises and conjectures is also for the reason that without assigning any reason the Arbitrator determined the profits to be 4% of the contract value of the 1st phase.

17. On a specific query being put to Mr. Dadwal, learned Counsel for the Contractor, it could not be shown as to in what manner the impugned Award was in conflict with the public policy of India or the provisions of the contract or the Act necessitating interference by the Court, except that the ratio of law laid down by the Apex Court in A.T. Brij Paul Singh and Bros. v. State of Gujarat : AIR 1984 SC1703 , was not adhered to by the Arbitrator while arriving at this conclusion in awarding profits by 4%.

18. While dealing with claim No. 1 (Part I to Part IV), the Arbitrator has extensively dealt with the correspondence exchanged between the parties placed on record. The Arbitrator held that there was a delay of more than four months in handing

over the site and also further delay in adjusting the lay out as per the Architects drawings at the site which was evident from the award letter dated 23.4.1998 and also letters dated 5.9.1998 and 1.10.2002. But however, in the absence of any cogent and documentary evidence and proof, it could not be proved that the Contractor had actually employed and paid monies for deployment of the staff as claimed. However, the Arbitrator partly allowed the claims with regard to the engagement and deployment of one Engineer, one Supervisor, one Carpenter and one Chowkidar.

19. Importantly, it was the contractor's grievance that neither any site nor any material was handed over to him. Admittedly, he is a Class-A registered contractor having experience of 28 years. The Arbitrator has in my view rightly come to the decision that there was no occasion for the Contractor to have employed and deployed staff at the site as no site was handed over. Be that as it may be, the fact of the matter is that even with regard to such deployment and payment made to the staff, there is no evidence to substantiate the same. The Arbitrator took note of the fact that the Contractor could have placed on record proof by way of log book of machinery, books of accounts, income tax returns to show that sufficient man and machinery had been engaged and deployed which remained idle for the entire contract period. No doubt vide letters dated 17.7.1998, 28.10.1998, 17.11.1998, 1.12.1998 and 31.3.1999 the contractor had expressed its concern with regard to the increase of price and the deployment of staff and labour and machinery, but however, even these letters are conspicuously silent with regard to the actual number of persons, machinery and the period of deployment.

20. Importantly, the contract was to be executed into two phases. The duration period for the first phase was three months. Having learnt that the permission had not been given, the Contractor, an experienced person ought not to have kept his men and machinery idle. Admittedly, the Contractor was having other ongoing works at the relevant time. Therefore, the possibility of the same being utilized for execution of the other contracts is also not ruled out.

21. Even at the time of hearing, except for the abovementioned letters nothing has been shown to prove that men and machinery was either deployed or remained

idle. In this view of the matter, the findings returned by the Arbitrator cannot be faulted. The award is not contrary to the terms of the agreement or the law. It is not in conflict with the Public Policy of India.

22. That the Company committed material breach of the terms of the contract now stands conclusively adjudicated. That the Contractor was in a state of preparedness, ready to perform his part of the reciprocal contractual obligation also stands proved. The Arbitrator has already held the respondents to have committed breach of the contractual obligation. In this view of the matter, the contractor's entitlement to the profits for breach of the terms of the contract is undisputed. A.T. Brij Paul Singh and Bros. v. State of Gujarat : AIR 1984 SC1703 .

23. The learned Arbitrator has considered this judgment. However, the fact of the matter, is that nothing was placed on record to prove the extent of profits which the contractor expected in the present contract. The Contractor did not produce any evidence including income tax assessment, audited accounts of the profits gained from other works carried out by him. Even with regard to the present contract no pre bidding estimates were placed and proved. There is no material to prove prevalent market/trader practice indicating the extent of profits usually earned by the contractors in similar type of works.

24. The Contractor's plea that even under the provisions of the Income Tax Act, authorities accepted flat rate of 8% as profits on gross receipts, in my view, was rightly rejected by the Arbitrator for the reason that the provisions were applicable only to such cases where the gross receipts were less than 40 lacs. In the present case, as is evident from the Contractor's own letter dated 9.3.1998, the Contractor was executing contract valuing Rs. 2.5 crores, out of which the works to the extent of one crore stood executed in a short period of 4-5 months.

25. In A.T. Brij Paul Singh and Bros. v. State of Gujarat : AIR 1984 SC1703 , the Apex Court has held that measure of profits to be awarded would depend upon the facts and circumstances of each case. Reasonable expectation and profit is implicit in the works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of the breach of the contract. The Court observed that:

Hudson's Building and Engineering Contract (1970), tenth edition and observed that 'in major contracts subject to competitive tender on a national basis, the evidence given in litigation on many occasions suggests that the head-office overheads and profit is between 3 to 7% of the total price of cost' which is added to the tender.

26. The Apex Court did not lay down any proposition of law that in contracts of this nature the expected/anticipated profits would be to the extent of 15%. Profits to the extent of 15% were construed to be just and reasonable in the facts and circumstances of that case for the reason that in relation to contracts of similar works executed between the same parties, 15% profit was held to be justifiable by the Court.

27. Therefore, in the absence of any cogent material and proof, the Arbitrator in its wisdom, purely on the basis of guess work determined the loss of profit to be 4% of the tendered cost of Phase-I of the work.

28. While directing refund of security deposit, the Arbitrator has awarded interest only from 1st April, 1999 and not from the date of deposit made in April, 1998. The Arbitrator has not assigned any reason for the same. In my view, the award needs to be modified to this extent. Since the Arbitrator found that the Company had committed material breaches and the forfeiture of the earnest money was illegal, the interest on the same ought to have been awarded from the date of the deposit which is 23.4.1998 instead of 1st May, 1999. Ordered accordingly. The award is directed to be modified to the aforesaid extent.

29. Mr. Sanjeev Kuthiala, learned Counsel for the Director, drawing strength from the decision of the Apex Court in Rajasthan State Road Transport Corporation v. Indag Rubber Ltd. : (2006)7SCC700 and in Modermott International Inc. v. Burn Standard Co. Ltd and Ors. : (2006)11SCC181 , has pressed for reduction of the amount of awarded interest from 10% to 6.5%. The submission needs to be rejected on two counts (i) The Director has not filed any objections to the award and can be said to have accepted the same, (ii) The decision of the Apex Court in exercise of its power under Articles 142, 143 was in the peculiar facts and circumstances of the case. In reducing the amount of interest, inordinate delay in

the conduct of the arbitral proceedings and long pendency of the matter before various Courts weighed with the Court. In the present case these are not the facts. No doubt, matter is pending for last 10 years but however, without any fault or delay attributable to the contractor.

30. Under Section 34 of the Act, the scope of interference in an award passed by the Arbitrator is quite narrow. The Apex Court in *Satnita Conductors Ltd. v. Euro Alloys Ltd.* (2001) 7 SCC 728 and *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* : [2003]3SCR691, held that the expression 'public policy of India' would mean that a foreign award cannot be recognized or enforced if it is contrary to (i) the fundamental policy of Indian Law; (ii) the interests of India; (iii) justice or morality.

31. In *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission* : AIR 2003 SC4519, the Apex Court has approved the ratio of law laid down in its earlier decision in *Rajasthan State Mines & Minerals Ltd, v. Eastern Engineering Enterprises* : AIR 1999 SC3627, as under:

35. In *Rajasthan State Mines & Minerals Ltd. (supra)* whereupon Mr. Rohtagi placed strong reliance, this Court held that the dispute to the arbitrator could not be termed as without jurisdiction but proceeded to consider the question as to whether he will have authority or jurisdiction to grant damages or compensation in the teeth of the stipulation providing that no escalation would be granted and that the contractor would only be entitled to payment of the composite rate as mentioned and no other or further payment of any kind or item whatsoever shall be due and payable by the Company to the contractor.

36. It was concluded : (SCC pp 309-10, para 44)

44 (a) It is not open to the Court to speculate, where on reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(b) It is not open to the Court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the Court cannot interfere.

(d) If no specific question of law is referred, the decision of the Arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of non-speaking award, the jurisdiction of the Court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

32. In *Bharat Coking Coal Ltd. v. Annapurna Construction* : AIR 2003 SC3660 , it has been held as under:

There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameter of the contract, his

award cannot be questioned on the ground that it contains an error apparent on the face of the record.

33. The Apex Court has examined the powers of the Arbitrator for awarding interest who has the authority to award interest for pre-reference period, interest from the period after entering upon reference till award namely pendente lite interest and interest from the date of award till payment. [Secretary Irrigation Department, Government of Orissa and Ors. v. G.C. Roy and T.P. George v. State of Kerala and Ors. (2001) 2 SCC 758.

34. It cannot be said that the Award is in conflict with public policy of India or any one of the principles laid down by the Apex Court in its decisions. The claims and the amounts awarded are all questions of fact which the Arbitrator has gone into after taking pains of considering the material in its entirety. The claims are not barred in law or the terms of the agreement or in conflict with the public policy of India, therefore, I see no reason to interfere with the impugned award.

35. The Award is made fairly after giving adequate opportunity to the parties to place their grievance in any manner as provided in the Arbitration agreement. The award is not amenable to correction by this Court.

36. For the aforesaid reasons, the objections are partly allowed and the impugned award is modified as observed hereinabove.