

State of Orissa and Another

Vs

Kalinga Construction Co. (P) Ltd.

Civil Appeal No. 2023 of 1969

(J. C. Shah, A. N. Grover, K. S. Hegde JJ)

11.09.1970

JUDGMENT

GROVER, J. -

1. This is an appeal by certificate from a judgment of the Orissa High Court relating to an award given by Shri A. V. Viswanatha Sastri, an ex-Judge of the Madras High Court, in a dispute which arose between the respondent and the Union of India in respect of a claim made by the former for a sum of Rs. 35,45,080.91 which was stated to be due for earthwork done on the right dyke of the Hirakud Dam.

2. The Chief Engineer, Hirakud Dam, invited tenders on behalf of the Union of India for execution of work specifying certain details as to how tenders were to be submitted. It appears that before the tenders were invited certain estimates were prepared in the office of the Chief Engineer. The intending contractors were to submit tenders stating the rate for depositing earth on the Right Dyke site including all lifts and leads. The respondent company submitted a tender which, according to the Chief Engineer, was not in the form invited by him as certain extraneous matters were stated to have been introduced. The Chief Engineer and the representatives of the respondent company held a conference at which certain agreements were arrived at. The tender of the contractor was provisionally accepted on December 21, 1951; the formal contract was executed much later on March 21, 1953. The work started in February, 1952 and took four years for completion. The earthwork was done by the company by manual labour for a year in the beginning and thereafter it was done to a large extent by machinery. The earth required to erect the dyke was dug up from certain area demarcated by the Engineering Department near the site of the dyke. The places from which the earth had to be taken were called "borrow pits" or "borrow areas". The company dug up earth from the "borrow pits" and dumped it on the site of the dyke up to the required specifications. This involved movement of the loose earth both vertically and horizontally from the borrow pit to the dyke. The vertical movement was styled as "lift" and the horizontal movement as "lead". When the company started employing the heavy machinery from the beginning of 1953 onwards a number of ramps had to be constructed to enable the machinery to go up from the borrow pits to the dyke.

3. It has not been disputed that for the earthwork done by the company it received payment from the Government of an amount aggregating Rs. 1,08,19,543.00. This amount was paid in accordance with the rate in Item 1-A of the contract (Ext. P-69). According to that rate Rs. 45/- were to be paid for 100 cubic feet of "earthwork of all kinds of soil lain in 6" layers with rough dressing including all lifts and average lead not exceeding 10". According to the company an additional sum of Rs. 28,20,798.75 was due in addition to the amount already paid in respect of extra leads including lifts. An amount of Rs. 2 lakhs was claimed on account of the construction of ramps. The company

further claimed a sum of Rs. 5,34,282.16 on account of interest on the aforesaid two amounts. This claim was disputed by the Union of India and it was maintained on its behalf that the company had been fully paid for the earthwork done by it according to the terms of the contract and that the company was not entitled to payment for lifts not was there any occasion for leads in excess of an average of 10" and further that the ramps in so far as they were outside the dyke were not to be paid for while those which had been incorporated in the dyke had already been paid for as a part of the dyke.

4. The agreement by which reference was made to the arbitrator was as follows :

"The disputes and differences between the parties relating to payment of lift equivalent and leads for machine route are referred to the arbitration of Shri A. V. Viswanatha Sastri, retired High Court Judge Madras, and his award shall be final and binding on the parties."

5. On November 16, 1958, the following issues were framed by the Arbitrator by the consent of both the parties :

"(i) Is the claimant entitled to any payment for lifts under the terms of the contract between the parties ?

Note : Both sides agree that one foot of lifts is equal to 12 1/2 feet of lead.

(ii) Whether the claimant is entitled to payment for machine leads where machines have been used for earthwork and if so, on what basis and at what rates ?

(iii) Whether in the case of machine leads, lifts are not taken into account as pleaded by the Union of India ?

(iv) Whether the claimants are entitled to the cost incurred in putting up the ramps ?

(v) Is the Union of India estopped from denying liability for payment of lifts and machine leads for the reasons stated in Paragraphs 11 to 14 of the Statement Claim of Kalinga Construction Co. (P) Ltd. ?

(vi) Is the claimant entitled to interest for the period during which the amounts payable to the claimant remained unpaid by the Government, if so, at what rate ?

(vii) What is the amount due to the claimant from the Union of India ?"

6. A good deal of oral and documentary evidence was led by both the parties before the arbitrator. After discussing the same he came to the following conclusions :

(1) The tender must be taken to have been made and accepted on the basis that the whole work was to be done by manual labour.

(2) According to the terms of the contract if the average lead of 10" had to be exceeded the orders of the Chief Engineer in writing had to be obtained by the contractor and then the extra lead was to be paid for at the rate of Rs. 1-12 As. per 1,000 cubic feet. The company did raise the question of payment for lifts as early as

December 30, 1952 and sought the orders of the Chief Engineer in writing for the extra lead resulting from the conversion of lifts into leads but the Chief Engineer never made any order in writing. The arbitrator believed the evidence of the Chief Engineer, Shri Kanwar Sain, that he passed no orders allowing the company an extension of lead beyond the average 10". As the obtaining of the written order of the Chief Engineer was an essential condition which had to be complied with before a claim for extra lead could be made the company was not entitled to payment for the extra leads beyond the average 10".

(3) The letter Ext. P-6, dated March 30, 1953, which was signed by the Superintending Engineer for the Chief Engineer had not been proved to have been written either under the instructions of the Chief Engineer or approved by him. In this letter it was stated, inter alia, that the words "average 10" leads mentioned in the special conditions of the agreement include the initial lead and lift and all other lifts between the borrow area and the Dyke". The Chief Engineer's evidence relating to Ext. P-6 was believed.

7. The final conclusion of the arbitrator on Issue No. 1 was that under the terms of the contract between the parties the rate of Rs. 45/- per 1,000 cubic feet covered all lifts and that lifts had not to be separately paid for. On Issue No. 2 the company's claim for extra payment for machine leads was held to be untenable. The finding on Issue No. 3 was that in case of machine leads lifts were not to be taken into account. On Issue No. 4 the Arbitrator held that the company was not entitled to recover the costs incurred in putting up the ramps. On Issue No. 5 it was decided that the Government was not estopped from denying liability for payment for lifts and machine leads. On Issues 6 and 7 the Arbitrator found that no amount was payable by the Union of India to the company nor was the Union liable to pay any interest.

8. The respondent company filed what was called a plaint under Sections 30 and 33 of the Indian Arbitration Act, 1940, in the Court of the Subordinate Judge, Sambalpur, challenging the award on various grounds and prayed that it be set aside. It was further prayed that another arbitrator be appointed to make a fresh award regarding the disputes between the parties. The Subordinate Judge set aside the award by his order, dated March 17, 1962. The Union of India preferred an appeal to the High Court which was heard by Barman and Das, JJ. Learned Judges gave dissenting judgments. Barman, J., was of the opinion that the award was not liable to be set aside. The appeal was then heard by a third Judge, G. K. Misra, J. On Issues 1 and 2 Misra, J. agreed with the judgment of Barman, J., but on Issues 3 and 4 he concurred with the decision of Das, J. According to his judgment the award could not be set aside on Issues 3 and 4 whereas it was liable to be set aside on Issues 1 and 2. As the issues were severable he set aside the award only on Issues 1 and 2.

9. A bare perusal of the judgment of Misra, J., would show that he decided the matter as if he was entertaining an appeal against the award itself. He re-examined and re-appraised the evidence which had been considered by the arbitrator and held that the arbitrator was wrong in coming to the conclusion that the work was contemplated by the contract to be done by manual labour alone. According to him under the agreement payment for machine leads was contemplated from the very beginning or at any rate was not excluded. He examined a large volume of evidence, including Ext. P-6 has also the oral evidence of the Chief Engineer, Shri Kanwar Sain, and held that from the course of correspondence it was clear that in dealing with the contractor or the Executive Engineer almost all the letters on behalf of the Chief Engineer were being dealt with by the Superintending Engineer. Once Ext. P-6 was admitted to be genuine and was issued by the Superintending Engineer

in the ordinary course of correspondence it was for the appellant to establish by production of the relevant records that that letter had been issued without authority of the Chief Engineer. Misra, J., had no hesitation in holding that Ext. P-6 was written under the authority of the Chief Engineer and was binding between the parties. Here again what Misra, J., did was to appreciate the evidence which had been considered by the arbitrator, in particular, the testimony of the Chief Engineer. The arbitrator had believed the statement of the Chief Engineer that Ext. P-6 had neither been issued under his authority nor with his approval. Once this part of his statement was believed by the arbitrator it was not open to Misra, J., to sit in appeal over the conclusion of the arbitrator in proceedings for setting aside the award.

10. The other serious error into which Misra, J., fell was to record a finding on the payment for extra leads beyond 10" in reversal of the conclusion of the arbitrator. This is what the learned Judge proceeded to say :

"The next point for consideration is whether the payments for extra leads beyond 10" are to be rejected because the Chief Engineer's order in writing had not been obtained before the work involving additional leads was executed. Both under Ext. P-2 and Ext. P-69 this term had been incorporated. In the peculiar circumstances of this case, however, it must be taken that the condition had been fulfilled even though there was no order in writing. It was for the Executive Engineer and the Superintending Engineer, who were getting the work done by the company, to obtain the order in writing or not to allow the company, to work beyond 10" leads, including lifts, without obtaining the order of the Chief Engineer in writing."

Once it was found that under the terms of the contract the order of the Chief Engineer in writing had to be obtained before the work involving additional leads was executed and in the absence of any such written order it was not open to the court to hold that the appellant-Union of India-was liable for payment of extra leads beyond 10" by applying some principle or rule analogous to estoppel. It is no doubt true that the company had been writing to the Engineer Department in the matter and that the latter did not, for a considerable time, send any reply but the company was debarred from asking for any additional payment in the absence of the Chief Engineer's order in writing. If the arbitrator came to that conclusion it could not be said that there was any error apparent in his award which would justify setting it aside.

11. For the reasons given above the appeal is allowed and the order of the High Court setting aside the award, dated July 19, 1959, in part as indicated in the judgment of Misra, J., is hereby reversed. The proceedings instituted by the respondent under Sections 30 and 33 of the Indian Arbitration Act, 1940, shall stand dismissed. In view of the entire circumstances the parties are left to bear their own costs in this Court.

</html