

M/s. Lakshnichand and Balchand

Vs

State of Andhra Pradesh

Civil Appeal No. 4083 of 1986

(R. S. Pathak, G. L. Oza JJ)

05.11.1986

ORDER

PATHAK, J. -

1. This appeal is directed against the judgment and order of the High Court of Andhra Pradesh disposing of a revision petition filed by the appellant in execution proceedings.
2. The appellant is a contractor, who entered into two agreements with the Government of the State of Andhra Pradesh for providing B.T. Macadam wearing coat and seal coat along two stretches of the Hyderabad-Vijayawada National Highway. While the work was in progress, the contractor made certain claims in respect of the loss suffered on account of delay, escalation of rates and other heads. The claims were referred to arbitration. On September 4, 1979 the Arbitrator held the contractor entitled to a sum of Rs. 99,00,000 under five heads of claim. The contractor applied to the civil court for making the award a rule of the court while the State Government prayed for setting aside the entire award. The civil court set aside the award and refused to pass a decree in terms of the award. The contractor appealed to the High Court, and on April 19, 1982 the High Court allowed the appeal to the extent of one of the claims only, the claim being for loss of profit in the sum of Rs. 16,00,000 together with interest. The appeal was dismissed in respect of the other heads of claim.
3. For the realisation of the amount due under the decree the contractor filed Execution Petition No. 48 of 1982 before the Fifth Additional Judge, City Civil Court, Hyderabad claiming recovery of Rs. 16,00,000 towards the decretal amount, Rs. 7,80,000 towards interest in terms of the award up to the date of the execution petition and Rs. 8691 towards costs of the execution petition. The State Government filed objections, contending inter alia that a sum of Rs. 22,91,332 was recoverable by it from the contractor and claimed adjustment against the amount due to the contractor under the said decree. It urged that after adjusting the amount due to the State Government the balance payable to the contractor would stand reduced to Rs. 76,667. This sum together with the other deposits of the contractor with the government and refundable to him, viz. Rs. 3,92,236 was deposited in the Executing Court. The contractor withdrew the amount without prejudice to his rights to contest the adjustment. The Executive Court held that the State Government was entitled to set off the amounts claimed by it, and accordingly adjourned the execution petition for further proceedings.
4. The contractor filed a revision petition before the High Court and contended that the State Government was not entitled to claim adjustment in execution proceedings. It was pointed out that the sum of Rs. 22,91,332, of which adjustment was sought by the State Government against the amount for which the contractor had taken out execution, consisted of (a) an amount of Rs. 10,21,800 claimed by the State Government as due to it upon the preparation of the final bill in

respect of the contracts covered by the award and (b) and amount of Rs. 12,69,532 claimed by the State Government under a separate contract on the ground that the contractor had committed a breach of that contract. The contractor disputed both claims. He contended that the final bill in respect of the earlier contract had been prepared in his absence and that he challenged the inclusion of several items in that bill. In regard to the latter amount he urged that he was not guilty of any breach of contract.

5. The High Court has found that so far as the first claim to adjustment was concerned the State Government was justified in making it because the arbitration was effected while the work was still in progress and the contract was in the process of execution by the contractor, and having regard to Clause 68 of the agreement final payment had to be made to the contractor after taking into account the amount which had been received by him earlier. The second claim to adjustment was made by the State Government under another contract, and the High Court justified that claim by reference to Clause 71 of that contract, which permitted the government to retain or deduct money due under the contract from an amount due to the contractor under any other contract. However, it held that the adjustments claimed by the State Government could not be made against the decretal amount but must await determination upon due arbitration.

6. Learned counsel for the appellant contends before us that the State Government is not entitled to a set off at all because, he says, a set off can be claimed only under Order 21 Rule 18 of the Code of Civil Procedure and that provision does not apply in terms to the present case. Learned counsel for the respondent urges, on the other hand, that the power of the court extends to granting an equitable set off in appropriate cases, and the High Court was therefore justified in making the order which it did.

7. We have no doubt that in certain cases the court has the power to allow a set off even in cases which do not strictly fall within the terms of Order 21 Rule 18 of the Code. A Full Bench of the Andhra Pradesh High Court has discussed the matter in *Bhoganadham Seshaiyah v. Budhi Veerabhadrayya* (AIR 1972 AP 134 : (1971) 2 Andh LT 227 : ILR (1972) 2 AP 298) and has examined at some length the circumstances in which such set off may be granted. The facts before us, however, call for a somewhat different consideration. So far as the first claim to adjustment is concerned, the matter is covered by Clause 68 of the contract. What was awarded to the contractor under the decree was an amount relating to a part only of the work entrusted to him. The contract was still in the process of execution. Any amount claimed by him for such work was subject to a final settlement of account on the preparation of the final bill. The right to payment depended on the terms of the contract. Any payment made while the contract was still being worked out was in the nature of a provisional payment. It was always subject to adjustment against amounts found due against the contractor on preparation of the final bill. Such adjustment was implied in the very terms of the contract. Therefore, in regard to the adjustment claimed by the State Government on the first count the High Court is right, in our opinion, in holding that the amount claimed by the State Government, as determined on arbitration, was entitled to set off against the decretal amount claimed by the contractor, and that payment of the decretal amount was to be subject to such adjustment.

8. In regard to the claim to adjustment on the second count the position is more controversial. The claim is founded in the doctrine of equitable set off, but we do not find evidence before us to bring the case within the operation of the doctrine. It is not a case where cross demands arise out of the same transaction or the demands are so connected in their nature and circumstances that they can be looked upon as part of one transaction. Nor can assistance be derived from Clause 71. The benefit of

that provision can be claimed only if the amount sought to be retained is an ascertained sum, an amount which can be readily adjusted against the amount payable under the other contract. Here, the amount sought to be adjusted has yet to be determined as a liability against the contractor. It has been disputed by the appellant. Accordingly, Clause 71 cannot be invoked. In the result, the decision of the High Court in respect of the adjustment of Rs. 12,69,532 cannot be sustained.

9. In the circumstances, the appeal is allowed in part, the judgment and order of the High Court is modified insofar that while the adjustment claimed by the State Government on the basis of the final bill relating to the contract covered by the award is maintained, the direction in respect of the adjustment of the claim made under the other contract is set aside. The parties will bear their own costs.

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