State of Orissa

Vs

Dandasi Sahu

Civil Appeal No. 1389 of 1988

(Sabyasachi Mukharji, S. Ranganathan JJ)

22.07.1988

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. This is an appeal by special leave from the judgment and order of the High Court of Orissa, dated July 6, 1987. It arises out of a contract entered into between the State and the respondent for the construction of certain projects for irrigation. During 1973-74 the respondent was entrusted with the job of Construction of Ramaguda Minor Irrigation Project in Kukudakhandi Block' vide agreement No. 4-F-2. The value of the work was Rs. 9,99,510. The work pursuant to the contract commenced on May 4, 1973 and November 4, 1974 was the stipulated date for completion of the work. However, on December 30, 1975 the work was actually completed. It is asserted by the appellant that the respondent contractor accepted the final payment and was duly paid a sum of Rs. 23,74,001 for the work done by him including the extra work. Thereafter, no amount was due to the respondent, according to the appellant, and he did not raise an claim whatsoever before the department. On September 28, 1976 the last payment was alleged to have been made by the respondent. On October 30, 976 the last bill was prepared which was nil one. The respondent, thereafter, raised a claim and gave notice for appointment of an arbitrator. Consequently, the Chief Engineer appointed one Shri A. N. Nanda as the arbitrator in terms of the arbitration clause. However, on the application of the respondent the learned Subordinate Judge removed Shri A. N. Nanda and appointed one Shri B. Patnaik as the arbitrator. It may be mentioned that the application was made for removal of the arbitrator Shri B. Patnaik but the same was ultimately dismissed. Before the arbitrator, the respondent filed the claim raising some claims which, according to the alleged extra work in respect of which the decision of the Superintending Engineer under Clause 1 of the contract was final and the same was excluded from the purview of the arbitration clause.

2. It was contended on behalf of the appellant that the arbitrator had no jurisdiction to deal with such claims. The appellant filed a counter-claim for Rs. 2,11,400, denying all the claims of the respondent. All the documents and relevant papers were produced before the arbitrator. It is stated that as the application for removal of Shri B. Patnaik as arbitrator was pending, an application had been made before Shri B. Patnaik to adjourn the proceedings which was refused and the award was made. this award was claimed to have been made virtually ex parte. This, however, was not so and it appeared that the arbitrator on hearing the parties and considering the evidence produced before him made the award. The arbitrator made the said award on March 18, 1993 but the same was a non-speaking and non-reasoned award for a lump sum of Rs. 15,23,657 plus interest @ 10 per cent from September 9, 975 till the date of payment or decree. Objections to the said award were filed in the court. The learned Subordinate Judge upheld the objection to the award and set aside the award on September 15, 984. There was an appeal to the High Court and the High Court set aside the

judgment of the learned Subordinate Judge and made the award of the arbitrator, rule of the court. It also directed payment of future interest at 6 per cent.

3. Being aggrieved thereby the State of Orissa has preferred this appeal. In support of this appeal, it was submitted that the award in question was a lump sum of money and it was without any reason, in favour of the respondent. It was also submitted that the validity of the non-reasoned award is awaiting determination by a larger Bench of this Court. Hence, it was urged that this question should await decision of the larger Bench. In the facts and circumstances of the case, we are of the opinion that we would not be justified in acceding to this request on the part of the appellant. In this case the submission that the award was bad being an unreasoned one, was neither mooted before the learned subordinate Judge nor before the High Court. This contention was also not raised in the objection to the award, filed originally. It is only in the special leave petition that such a plea had been raised for the first time. Arbitration is resorted to as a speedy method of adjudication of disputes. Stale and old adjudication should not be set at naught or examination of that question kept at bay on the plea that the point is pending determination by a larger Bench of this Court. Even if it is held ultimately that the unreasoned award per se is bad it is not sure whether such a decision would upset all the awards in this country which have not been challenger so far. Certainly, in the exercise of our discretion under Article 136 of the Constitution and in view of the facts and circumstances of this case, we would not be justified in allowing the part to further prolong or upset adjudication of old and stale dispute.

4. In that view of the matter, we think that the pendency of this point before the larger Bench should not postpone the adjudication and disposal of this appeal in the facts of this case. The law as it stands today is that awards without reasons are not bad per se. Indeed, an award can be set aside only on the ground of misconduct or on an error of law apparent on the face of the award. This is the state of law as it is today and in that context the contention that the award being an unreasoned one is per se bad, has no place on this aspect as the law is now. This contention is rejected.

5. It was next contended that in view of Clause 11 of the contract the matters upon which the arbitrator has adjudicated were excluded and these were not arbitrator. It was submitted that Clause 11 of the contract between the parties made on these matters the decision of the Engineer-in-charge final and binding. Hence, inasmuch as the arbitrator has purported to act upon this field which was only to be decided by the Engineer-in-charge, the award was bad. The disputes over which the arbitrator has purported to make an award, were regarding works covered by the agreement. It was submitted that the proviso to Clause 1 of the agreement categorically provided that in the event of dispute over a claim for additional work, the decision of the Superintending Engineer of the Circle would be final and, hence, the arbitrator by entertaining the additional claim of the contractor had exercised a jurisdiction not vested in him and, as such, misconducted himself.

6. In order to judge this contention, therefore, it is imperative first to refer to Clause 111 of the agreement. It provides as follows :

> Clause 11. The Engineer-in-charge shall have the power to make any alteration in or additions to the original specifications drawings, designs, and instructions that may appear to him necessary or advisable during the progress of work and the contractor shall be bound to carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-charge and such alteration shall not invalidate the contract. An additional work which the contractor may be directed to do in the matter above specified as part of the work, shall be carried out by the

> contractor on the same conditions in all respects on which he agreed to do the main work and at the same rates as are specified in the tender for the main work. The time for completion of the work shall be extended in the proportion that the additional work bears to the original contract work and the certificates of the Engineer-in-charge shall be conclusive as to such proportion and if the additional work includes an class of work shall be carried out at the rates entered in the sanctioned schedule of rates of the locality during the period when the work is being carried on and if such last mentioned class of work is not entered in the schedule of the rate of the district, then the contractor shall within 7 days intimate the rate which it is his intention to charge for such class of work and if the Engineer-in- charge does not agree to this rate he shall by notice in writing be at liberty to cancel his order to carry out class of work and arrange to carry out such class of work and arrange to out in such manner as he may consider advisable. No deviation from the specification stipulated in the contract or additional items of work shall ordinarily be carried by the contractor and should any altered, additional or substituted work be carried out by him unless the rates of the substituted, altered or additional items have been approved as fixed in writing by the Engineer-in-charge.

The contractor shall be bound to submit his claim for an additional work done during an months or before the 15th day of the following months accompanied by the cop of the order in writing of the Engineer-in-charge for the additional work and that the contractor shall not be entitled to an payment in respect of such additional work if he fails to submit his claim within the aforesaid period :

> Provided always that if the contractor shall commence work or incur an expenditure in regard thereof before the rates will have been determined as lastly hereinbefore mentioned, then in such case he shall only be entitled to be paid in respect of the determination of the rates as aforesaid accordingly to such rate of rates as shall be fixed by the Engineer-in-charge. In the even of a dispute the decision of the Superintending Engineer of the Circle will be final.

7. This clause has to be read in conjunction with the arbitration clause i. e. Clause 23, which provides as follows :

> Clause 23. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter, or thing whatsoever in any was arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution, or failure to execute the same whether arising during the progress of work, or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the Circle. It will be no objection to any such appointment that the arbitrator so appointed is a government servant. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this contract.

8. The learned Subordinate Judge was inclined to hold that the arbitrator had no jurisdiction to arbitrate on disputes which he has purported to do but in view of the Bench decision of the High

Court of Orissa in State of Orissa v. Gokulachandra Kanungo, he held that he was not free to decide that the dispute was not arbitrable and rejected this plea. The High Court also did not entertain this objection. It was canvassed before us and submitted that in view of Clause 11, the matters in dispute and the amount due for the alleged additional work, were not arbitrable at all. We have noticed Clause 11 which makes the decision of the Engineer-in-charge final in respect of some issues. In this connection, it is important to refer to the proviso of Clause 11 which states that in case of dispute about the rates and time for completion of the work and an dispute as to proportion that the additional work bears to the original contract work, the decision of the Superintending Engineer of the Circle would be final. The points upon which are excepted or covered by Clause 1 of the agreement. In that view of the matter, this clause has no application in the instant controversy.

9. Our attention was drawn to certain observation of this Court in Bombay Housing Board v. Karbhase Naik & Co., Sholapur. There in view of Clause 14 of the said contract, it was open to the respondent to make claim on the basis of the rates quoted. There, Clause 14 was more or less identical to Clause 11 in the present case. This particular contention, however, did not arise in that case. The court held that the respondent there being contractor, was not bound to carry out additional or altered work and there was no reply to the notice stating the rates intended to be charged and the respondent there was not free to commence and complete the work on the basis that since the rates quoted were not accepted, it would be paid at such rates to be fixed by the Engineer-in-charge and that if it was dissatisfied with the rate or rates fixed by the Engineer-in-charge, it could raise a dispute before the Superintending Engineer and that the time limit for completion would be extended in all cases. This Court observed that only the rates were settled by the agreement. The respondents were under no obligation to carry out the additional or altered work but that is not the dispute before us in the present case. On the construction of Clause 11 of the contract, we are unable to accept the contention but on the points that the arbitrator has awarded in this case, were excluded by Clause 11 of the contract herein. Shri Mehta, however, strongly relied on certain observations of a Bench decision Madhya Pradesh High Court in case of the Chief Administrator, Dandakaranya Project, Koraput v. M/s Prabartak Commercial Corpn. Ltd., Calcutta, Wherein while considering Clause 13-A of the agreement there the High Court held that the dispute whether charges for stone chips could be adjudicated, was not arbitrable. That was a case of rates which was within the jurisdiction of the Engineer-in-charge by Clause 13-A of the bargain between the parties. In the instant case it is not the rate which is in dispute. The Madhya Pradesh High Court referred to several decisions of this type and came to the conclusion on the construction of Clause 13-A in that case that the dispute that had arisen between the parties in arbitration, was excluded by Clause 13-A of the agreement. In view of the clause in the instant case and the nature of the dispute which had arisen, we are of the opinion that such decisions also placed on certain observations of the Delhi high Court in the case of Food Corporation of India v. P. L. Juneja. There the Division Bench of the High Court was concerned with the question which were to be decided by the court and not by the arbitration. There also the clause was very much dissimilar to the present one which is set out hereinbefore. Clause 15 (C) provided that the question whether a particular service is or is not to be covered by an of the services specifically described and provided for the contract, or is or is not material to an such services shall be decided by the Regional Manager whose decision shall be final and binding. It was not the case whether whose decision shall be final and binding. It was not the case whether any additional work was done and if so, the extent of such work. In the aforesaid view of the matter it is not possible to hold that in view of nature of instant dispute, the matters at issue were not (sic) excluded and the arbitrator did not (sic) commit any wrong in proceeding with the arbitration.

10. It was next contended that an amount of Rs. 15,23,657 has been granted for additional work

over and above the payment of Rs. 23,74,002 and this was disproportionately high and the award for this amount was per se bad. It is well settled that when the parties choose their own arbitrator to be the judge in dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon law or on facts. Therefore, when arbitrator commits a mistake either in law or in fact in determining the matters referred to him, where such mistake does not appear on the face of the award and the documents appended to or incorporated so as to form part of it, the award will neither be remitted nor set aside. The law on this point is well settled. See in this connection the observations of this Court in Union of India v. Bungo Steel Furniture Pvt. Ltd. and Allen Berry & Co. (P) Ltd. v. Union of India. It was, however, contended that the amount of the award was so shockingly high that it shocked the conscience of the court and the award must be set aside. The fact that merely the award amount is quite high as commented by the High Court or that a large amount has been awarded, does not vitiate the award as such. In the instant case the original award was for Rs. 9,99,510. Admittedly, additional work was done and payment for such work was determined at Rs. 23,74,001 and claim for further additional work was made for Rs. 15,23,657. One has to judge whether the amount of the award was so disproportionately high to make it per se bad in the facts and circumstances of a particular case. It is clear from the facts that the arbitrator is a highly qualified person having several Indian and foreign degrees and at the relevant time was acting as Chief Engineer-in-charge of the State Government. Having regard to the nature of claims involved and the fact that the additional work has been done for which large amounts have been paid and in this case it is evident that all due opportunities were given to the parties to adduce all evidence, we are unable to accept the submission that the award was so disproportionate as to shock the conscience of the court and, as such, it cannot be held that the award was bad per se. In our opinion, the High Court was right in dismissing the challenge to the award on this ground.

11. In support of the submission that the award must be held to be bad in this case. Mr. Mehta drew our attention to certain observations of Orissa High Court in State of Orissa v. Gangaram Chhapolia. Where at page 279 the learned Judge observed the malady of the racket of arbitration was rampant in Orissa. Here the learned Judge was apparently paying heed to the observations of Justice Holmes of America that the court should take note of "the felt necessities of the time".

12. In our opinion, the evidence of such state of affairs should make this Court scrutinise the award carefully in each particular case but that does not make the court declare that all high amounts of award would be bad per se. As mentioned hereinbefore, it cannot be said that the amount of award was disproportionately high to hurt the conscience of the court in this case.

13. It is now well settled that the interest pendente lite is not a matter within the jurisdiction of the arbitrator. In this connection reference may be made to the observations of this Court in Executive Engineer (Irrigation), Balimela v. Abhaduta Jena where this Court held that the arbitrator could not grant interest pendente lite. In the aforesaid view of the matter this direction in the award for the payment of such interest must be deleted from the award. The order of the High Court is modified to the extent that the award is confirmed subject to deletion of the interest pendente lite. We make it clear that in the facts of this case interest for the period from September 26, 1981 to March 18, 1983, the date of the award be deleted. The High Court has, however, granted interest from the date of the decree. That is sustained.

14. The appeal is, therefore, dismissed except to the extent indicated above. In the facts and circumstances of the case the parties will pay and bear their own costs.

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