

Dandasi Sahu

Vs

State of Orissa

Civil Appeal No. 4800 of 1989

(Sabyasachi Mukharji, V. Ramaswami II JJ)

30.11.1989

JUDGMENT

RAMASWAMI, J. -

1. Special leave granted.

2. In respect of a dispute relating to the work Lankagada Minor Irrigation Project (Balance Work) in Jagannathprasad Block which was entrusted to him, the appellant-contractor, invoking clause 23 of the agreement and Section 8 of the Arbitration Act requested the China Engineer, Rural Engineering Organisation, Bhubaneswar, Orissa, to nominate an arbitrator. It may be mentioned that before making this request for nomination of an arbitrator the appellant made a claim on June 16, 1975 before that Executive Engineer, M.I. Division, Berhampur, Ganjam, claiming to be paid a sum of Rs. 2,81,745. He had also claimed interest on this at the rate of 18 per cent from the date of receiving of the claim book till payment. The work entrusted to the appellant was to commence on December 6, 1971 and to be completed within 18 months i.e. on or before June 5, 1973 and the total cost of the work was Rs. 9,98,970. One Shri D. C. Panda, Superintending Engineer, Central Range, was nominated as the sole arbitrator to decide the dispute and give the award. This arbitrator having accepted the appointment entered on the reference and issued notices to both the parties directing them to file their claims. The appellant filed a claim statement on April 5, 1977 before the arbitrator. In this claim statement he had made a detailed description of each of the items of the claim and the total of the 15 items claimed came to Rs. 3,87,796. To this he added interest at 18 per cent from the date which according to him each of the claims should have been settled making a total claim of interest to the tune of Rs. 2,95,894. He thus prayed for an award of Rs. 6,83,690 and also prayed for further interest on Rs. 3,87,796 from April 6, 1977 till date of award and there-after until payment at 18 per cent. It may be mentioned that in this statement of claim made before the arbitrator some of the claims made before the Executive Engineer were omitted, some other items of claim were enhanced. The State of Orissa filed a written statement and the arbitration proceedings continued for some time but before the arbitrator could make the award an application before the Subordinate Judge, Bhubaneswar was filed under Sections 8(2) and 12 of the Arbitration Act. By an order dated December 17, 1979 the learned Subordinate Judge removed the arbitrator and appointed one Shri J. Pati, Chief Construction Engineer, Paradip Port as the sole arbitrator to decide the dispute between the parties. However, since Shri. J. Pati expressed his inability to arbitrate, by another order dated April 16, 1980 the court appointed Shri. Banabasi Patnaik, Superintending Engineer, Sambalpur as the sole arbitrator in place of Shri J. Pati. This arbitrator entered on the reference, got all the relevant records from the previous arbitrator continued the hearing on June 9 and July 9, 1980. On the ground that the appellant has not included some of his claims "relating to this work" in the claim statement submitted to the previous arbitrator, he made a supplemental claim for a sum of Rs.

8,27,857 and prayed that in addition to the claim stated in the original claim statement a sum of Rs. 8,27,857 be awarded in his favour with interest at 18 per cent per annum on Rs. 8,27,857 from October 14, 1973 till date of payment. The State of Orissa not only disputed the claim made but also objected to that entertainment of an additional claim in their written statement dated August 13, 1981. The arbitrator, however, decided to entertain the supplemental claim and proceeded with the hearing of the dispute. The supplement claim consisted of 11 items. As seen from the note papers, the arguments on supplemental claims 1 to 6 were heard on two different dates and the hearing was adjourned to November 8, 1981. On that day arguments in respect of rest of the supplemental claim items were heard and the hearing was closed. On the same day the appellant-contractor filed what he termed as one consolidated 'abstract' of his two statements and the abstract showed a total claim of Rs. 31,44,437 and he had further prayed in this that the total amount of Rs. 31,44,437 may be allowed along with an interest at 18 per cent per annum on the said amount from November 9, 1981 till date of payment. The arbitrator made an award on December 7, 1981 allowing a lump sum of Rs. 25,00,156 together with interest at 9 per cent after the expiry of 30 days from the date of making the award, till the date of payment or decree whichever is earlier. The award was filed in court for making a decree and the government filed an application to set aside the award on various grounds. The trial court overruled the objections of the State and the award was made a decree of the court. However, learned Judge disallowed the interest from the date of decree till realisation. On appeal by the State Government, the High Court came to the conclusion that award suffers from non-application of the mind amounting to legal misconduct. In that view the award was set aside and the matter was remitted back to the Arbitration Tribunal constituted under Section 41-A of the Arbitration Act as amended by Orissa Act of 3 1983. The contractor-claimant has filed this appeal against this judgment of the High Court.

3. As is seen from the award though it refers to getting all the relevant records from the ex-arbitrator there is no reference to the hearing of the parties or consideration of the documents relating to the original claim made on April 6, 1977. In the order sheet it has been mentioned that both parties had agreed that they had nothing more to add except what had been already given in their respective claim and counter-statement and what had been recorded in the depositions already made before the previous arbitrator. The reference to depositions already made is incorrect as it is admitted by both the parties that no deposition was at all recorded before the previous arbitrator nor there is any record of the previous arbitrator, showing such oral evidence was recorded by him. Neither of the parties adduced any oral evidence before the new arbitrator. Though the arbitrator is not bound to disclose as to what interpretation he has made and what inference he has derived from the documentary evidence, he is bound to refer in the award that he had considered all the documents placed before him no matter whether he relies on them or discards them from consideration. The arbitrator in his award ex facie does not mention that he has referred to or considered the documents placed before him in respect of the original claim. The order sheet mentions about the hearing on different dates relating to the supplemental claim statement which was filed before him. It is this argument in respect of the supplemental claim that has been mentioned the award.

4. The other point to be noted is that the original claim together with supplemental claim do not make total claim of Rs. 31,44,437. It is seen from the records that the arbitrator directed the claimant to submit a consolidated claim abstract which was submitted by him on November 8, 1981 the date on which the hearing by the arbitrator was concluded. There is clearly some discrepancy while consolidating both the claims. In addition to the total of both the claims some other amounts, may be by way of extra interest or otherwise, have been included but the arbitrator seems to have not applied his mind. Then again in the award it is stated that the total amount claimed by the claimant-appellant inclusive of "damages, compensation and interest" is Rs. 31,44,437. Even the

'abstract' filed before the arbitrator does not show any claim of "damages" or "compensation". As may be seen from the facts set out above before the appellant demanded the appointment of an arbitrator he had a claim before the Executive Engineer for a sum of Rs. 2,81,745. This is an itemised claim. This claim was made in the claim book kept by the Executive Engineer. It may be that this claim did not cover the entire amount due. We may point out that in the letter demanding the appointment of an arbitrator he had stated that during the execution of the work he had executed many extra items of work as per directions of the department and also incurred heavy expenditure which were not covered in the agreement and that he had submitted "most of many claims in the claim book on June 16, 1965 but these have not yet been decided". It may also be mentioned that in this letter itself he has stated that he has completed the work in all respects on September 14, 1973 and that though the final bill which should have been paid to him. The claim made before the arbitrator originally as already stated was Rs. 6,83,690 of which a sum of Rs. 3,87,796 represented the value of the work not paid and the remaining represented interest claimed. The total agreed value of the work entrusted to the appellant was Rs. 9,98,970. In the counter-affidavit filed by the State of Orissa in the special leave petition it is stated that a total of Rs. 23,11,887 had been paid to the appellant-contractor by November 20, 1976 which was with reference to the original work entrusted and the extra work done by the appellant. A rejoinder was filed by the appellant to this counter-affidavit but the fact of payment of Rs. 23,11,887 is admitted. The supplemental claim itself was filed on July 10, 1980 and that amounted to Rs. 8,27,857 over and above Rs. 6,83,690 which he had claimed originally before the arbitrator. Then again the 'abstract' filed by him on November 8, 1981 showed a figure of Rs. 31,44,437 as the claim. We have already pointed out that the total of the claim made on April 5, 1976 and the supplemental claim made on July 10, 1980 itself will not make anyway that figure of Rs. 31,44,437 and, therefore, some more claims have been included. The foregoing facts do show that the award suffers from non-application of the mind by the arbitrator.

5. This Court in *State of Orissa v. Dandasi Sahu* ((1988) 4 SCC 12) to which one of us (Sabyasachi Mukharji, J.) was a party while noting that the amount awarded is quite high or that a large amount has been awarded does not by itself vitiate the award as such, observed that one has to judge whether the amount of the award was so disproportionately high to make it per se bad on the facts and circumstances of a particular case. In this connection we have to keep in mind that we are concerned with a situation where the arbitrator need not give any reason and that even if he commits a mistake either in law or in fact in determining the matter referred to him, where such a mistake does not appear on the face of the award, the same could not be assailed. The arbitrator, in the case of a reference to him in pursuance of an arbitration agreement between the parties, being a person chosen by parties is constituted as the sole and the final judge of all the questions and the parties bind themselves as a rule to accept the award as final and conclusive. The award could be interfered with only in limited circumstances as provided under Sections 16 and 30 of the Arbitration Act. In this situation we have to test the award with circumspection. Even with all these limitations on the powers of court and probably because of these limitations, we have to hold that if the amount awarded was disproportionately high having regard to the original claim made and the totality of the circumstances it would certainly be a case where the arbitrator could be said to have not applied his mind amounting to legal misconduct. It may be seen that in this case in the original claim made before the arbitrator the value of the work not paid was stated as Rs. 3,87,796. The supplemental claim made before the arbitrator amounted to Rs. 8,27,857. Thus the total value of the work not paid, according to the appellant, was Rs. 12,15,653. As against this claim the arbitrator has awarded a lump sum of Rs. 25,00,156. It is true that the appellant had asked for payment of interest and including interest and including interest his claim was Rs. 31,44,437. In a recent judgment of this

Court in *State of Orissa v. Niranjan Swain* ((1989) 4 SCC 269), it has been held that where a reference to arbitration was made prior to the commencement of the Interest Act, 1978 (which Act came into force on August 19, 1981) the arbitrator not empowered to grant interest for the period up to the date of submission of the claim or the period during which the dispute was pending before the arbitrator. It was further held that where the award granted lump sum amount it shall deem to have included the interest also if interest had been claimed before the arbitrator and the inclusion of such interest rendered that part of award invalid. If we exclude the interest portion then there could be no doubt that award of Rs. 25,00,156 suffers from the vice of giving disproportionately high amount.

6. The learned counsel for the appellant, however, contended that the invalid part relating to the grant of interest may be set aside and the award may be accepted so far as the claim for the value of the work done applying the formula adopted in *State of Orissa v. Niranjan Swain* ((1989) 4 SCC 269). The learned Judges who decided the case after holding that inclusion of the interest rendered the award invalid part, proceeded to separate the invalid part from the rest stating that the total amount awarded is principal plus interest, the rate of interest and the period for which the interest was claimed before (sic being) known, the principal could be determined easily, and on that basis the principal amount and the interest out of the total amount awarded was divided and the award was sustained relating to the principal. We are unable to apply this principle in this case as the State had disputed major part of the claim in their counter-statements before the arbitrator and we have held that the award suffers not merely on the ground that it included interest but also on the ground of non-application of the mind.

7. We are also of the view that there was nothing wrong in the approach of the High Court and that is not a fit case for interference under Article 136 of the Constitution. We accordingly dismiss the appeal with costs.

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