S. Harcharan Singh

Vs

Union of India

Civil Appeals Nos. 322 and 323 of 1976

(Ranganath Misra, M. M. Punchhi, S. C. Agrawal JJ)

28.08.1990

JUDGMENT

S. C. AGRAWAL, J. -

1. Civil Appeal No. 322 of 1976. - This appeal by special leave has been filed against the judgment dated March 27, 1973 of the High Court of Delhi in F.A.O. (O.S.) No. 35 of 1968.

2. The appellant, S. Harcharan Singh, was awarded a contract for constructing approaches to the Bridge Structure B-2 on the North Sikkim Road in 1959-60. Under the agreement the appellant was required to do hard rock cutting to the extent of 7,54,530 cft. The rate fixed for the said work in the contract was Rs.129 per thousand cft. plus 2 per cent. The appellant was required to perform hard rock cutting to the extent of 18,18,704 cft. The appellant claimed payment at the rate of Rs. 200 per thousand cft. for the additional work of hard rock cutting. He also claimed certain other sums under other heads. The dispute in respect of four heads was referred to arbitration in accordance with clauses 25 of the agreement. The arbitrator gave his award dated February 5, 1965 wherein he disallowed the claim of the appellant in respect of two items but made an award in favour of the appellant in respect of two items of claim. In this appeal we are only concerned with the claim of the appellant in respect of the additional work of hard rock cutting which the appellant was required to execute. The arbitrator awarded a sum of Rs. 52,800 against the said item. The award was filed in the High Court by the arbitrator along with the letter dated June 6, 1968. Objections were filed by the respondent under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred to as 'the Act'). The said objections were considered by the learned Single Judge of the Delhi High Court and by order dated April 23, 1969, the said objections of the respondent were rejected and it was ordered that the award be made a rule of the court. The respondent filed an appeal against the said order and decree passed by the learned Single Judge. The appeal as partly allowed by the Division Bench of the High Court by judgment dated March 27, 1973, whereby the award as regards the claim for higher remuneration at the rate of Rs. 200 per thousand cft. for the additional work of hard rock cutting was set aside. The award in respect of other item of the claim relating to expenditure incurred by the appellant in reconstructing the retaining walls after damage, was maintained. Aggrieved by the said decision of the Division Bench of the High Court the appellant had filed this appeal after obtaining special leave.

3. As indicated earlier, this appeal is confined to the claim of the appellant for payment for the additional work of hard rock cutting which the appellant was required to execute. The appellant has claimed a higher rate of Rs. 200 per thousand cft. for this additional work. Under the agreement the appellant was required to execute hard rock cutting to the extent of 7,54,530 cft. but actually he was required to execute such cutting to the extent of 18.15 lakhs cft. The extent of the additional work

was about 10.60 lakhs cft., i.e. about 140 per cent. While undertaking the execution of the additional work of hard rock cutting the appellant in his letter dated August 24, 1960 addressed to the Executive Engineer, Central Division No. II, Gangtok, had requested for revision of the rate for hard rock cutting and stated that the minimum working rates for this item are 52 per cent above the tendered rates. The Executive Engineer by his letter dated September 2, 1960, requested the appellant to submit analysis of rate for hard rock cutting. The appellant submitted his analysis of rates on September 14, 1960 wherein after analysing the rates of materials and labour the workable rate worked out to Rs. 200 per thousand cft. The Executive Engineer also got an analysis of rates done on the basis of the data collected on actual observation and he arrived at a figure of Rs. 237 per thousand cft. By his letter dated November 9, 1961 addressed to the Superintending Engineer, Calcutta Central Circle No. III, CPWD, Calcutta, the Executive Engineer recommended the extra rate of Rs. 200 per thousand cft. for work in excess of 20 per cent of the stipulated quantity. The Superintending Engineer, in his letter dated February 23, 1962 addressed to the Additional Chief Engineer III, Central P.W.D. New Delhi, made a similar recommendation and the Additional Chief Engineer made a similar recommendation in his letter dated July 16, 1962 addressed to the Secretary to the Government of India, Ministry of Works and Housing. It appears that the government did not agree to pay at a rate in excess of the rate of Rs. 129 per thousand cft. plus 2 per cent stipulated under the agreement. The dispute was, therefore, referred to arbitration.

4. The arbitrator in his award has considered this item of claim as under :

> #Claim Dispute Award"The contractor claims The arbitrator is to The claim of thethat for Item No. 3 of determine whether contractor isthe agreement he should under the terms and partly justified.be paid at the rate of conditions of the con- He should be paidRs. 200 per 1000 cft. tract, the claim is an amount of Rs.for the quantities justified and if so, 52,800 (Rupeesbeyond what is stipu- to what extent. fifty two thou-lated in the agreement. sand eight hundred only) in addition to the payment to be made to him at relevant agree- ment rate for the total quantity of work executed by him under this item".##

5. Before the learned Single Judge it was submitted on behalf of the respondent that the award is speaking award and from the award it is apparent that the arbitrator has fixed rates for additional work done by the contractor which the arbitrator has no jurisdiction to do by reason by clause 12 of the agreement between the parties which provides that additions to the contact 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 specified in the tender for the main work. The learned Single Judge rejected the said contention and held that the arbitrator was determining only the value of the additional work at the rate of Rs. 200 which had been agreed by the Engineer-in-charge and the Superintending Engineer of the Circle as contemplated by clause 12 and the scope of the inquiry before the arbitrator was only the quantity of work which was additional to the quantities specified in the agreement. The learned Judges of the Division Bench of the High Court have disagreed with the said view and have observed that it is clear from the statement of claim as incorporated in the award, and the affidavit of the contractor that there was no dispute with regard to the quantity of work and the only dispute was with regard to the rate and that the arbitrator had allowed a sum of Rs. 52,800 to the contractor in respect of the total quantity of work executed by him under Item No. 3 in addition to the agreed rate and that there was no escape from the conclusion that the arbitrator had awarded the above amount by applying a rate higher than the agreed rate. The learned Judges of the Division Bench were of the view that under clause 12 of the agreement the provision with regard to the fixing of the rate by the Engineer-in-charge and the Superintending Engineer of the Circle

comes into play only when the additional item of work does not form part of the main work and the rates for such work are not specified in the schedule of rates. The learned Judges of the Division Bench have held that since the additional hard rock cutting job done by the appellant was part of the main work and the agreement provided the rate for the said item, there was not occasion for the Engineer-in-charge or the Superintending Engineer to fix the rate for the extra quantity of hard rock cutting and that the action of the arbitrator in allowing the rate to the contractor in excess of the agreed rate for the job of hard rock cutting was against clause 12 of the agreement and thereby the arbitrator had exceeded his jurisdiction.

6. As regards the award of an arbitrator under the Act, the law is well settled that the arbitrator's adjudication is generally considered binding between the parties for he is a tribunal selected by the parties and the power of the court to set aside the award is restricted to cases set out in Section 30 of the Act, viz. (a) if the arbitrator has misconducted himself or the proceedings; or (b) when the award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under Section 35; or (c) when the award has been improperly procured or is otherwise invalid. Under clause (c) of Section 30 the court can set aside an award which suffers from an error on the face of the award. It is, however, not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. But the jurisdiction of the arbitrator is limited by the reference and if the arbitrator has assumed jurisdiction not possessed by him, the award to the extent to which it is beyond the arbitrator's jurisdiction would be invalid and liable to be set aside. (See : Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji ((1964) 5 SCR 480 : AIR 1965 SC 214).) This position at law has been reiterated by the Constitution Bench of this Court in its recent decision in Raipur Development Authority v. M/s. Chokhamal Contractors ((1989) 2 SCC 721). It has been held that an arbitrator or umpire is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or the deed of submission he is required to give such reasons and if the arbitrator or umpire chooses to give reasons in support of his decision it is open to the court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the face of the record on going through such reasons and that an award can neither be remitted nor set aside merely on the ground that it does not contain reasons in support of the conclusion or decisions reached in it except where the arbitration agreement or the deed of submission requires him to give reasons.

7. In the instant case the arbitration agreement or the deed of sub-mission did not require the arbitrator to give reasons and, therefore, the award cannot be questioned on the ground of an error on the face of the award. The learned Judges of the Division Bench of the High Court have set aside the award in relation to claim No. 1 relating to payment for additional work of hard rock cutting on the ground that in making the award the arbitrator exceeded his jurisdiction by allowing a rate to the contractor in excess of the agreed rate for the job of hard rock cutting against the terms and conditions contained in clause 12 of the agreement.

8. The question which needs to be considered here is as to whether in awarding the sum of Rs. 52,800 to the appellant for the additional work of hard rock cutting executed by him the arbitrator has disregarded clauses 12 of the agreement. The said clause reads as under :

> "The Engineer-in-charge shall have power to make any alterations in, omissions from, additions to or substitution for, the original specifications, drawings, designs and instructions, that may appear to him to be necessary or advisable during the progress of the 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 alterations, omissions, additions or substitutions shall not invalidate the contract : and any altered, additional or substituted work which the contractor may be directed to do in the manner 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 the completion of the work shall be extended in the proportion that the additional or substituted work bears to the original work, and the certificate of the Engineer-in-charge shall be conclusive as to such proportion. And if the altered, additional or substituted work included any class of work for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in the schedule of rates of the CPWD. Schedule of Rates 53-54 on which the estimated cost shown on page 1 of tender is based provided that when the tender for the original work is a percentage above the schedule rates the altered, additional or substituted work required as aforesaid shall be chargeable at the said schedule rate plus the same percentage deduction (sic) addition and if such class of work is not entered in the said schedule of rates, then the contractor shall within seven days of the date of the receipt of the order to carry out the work inform the Engineer-in-charge of 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 be notice in writing be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable provided always that if the contractor shall commence work or incur any expenditure in regard thereto before the rates shall have been determined as lastly hereinbefore mentioned, then and in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-charge. In the event of a dispute the decision of the Superintending Engineer of the Circle shall be final."

9. Under this clause the Engineer-in-charge was empowered to make any additions to the original specifications that may appear to him to be necessary or advisable during the progress of the work and the contractor was bound to carry out the work in accordance with any instructions given to him in writing signed by the Engineer-in-charge. As regards payment for the additional work which the contractor was directed to do it was provided that :

"(i) The contractor shall be paid at the same rates as are specified in the tender for the main work;

(ii) If the additional work included any class of work for which no rate was specified in the contract then the contractor shall be paid at the rates entered into the schedule of rates of the CPWD. Schedule of Rates 53-54 on which the estimated cost shown on page 1 of tender is based and if the tender for the original work is a percentage above the schedule rates the additional work shall be chargeable at the said schedules rates plus the same percentage deductions/addition; and

(iii) If such class of work is not entered in the said Schedule of Rates then the contractor should inform the Engineer-in-charge within seven days of the receipt of the order the rate he wants to charge for such class of work and the Engineer-in-

charges, if he does not agree to the said rate, may cancel the order for such additional work and if the contractor has commenced the work or incurred expenditure in regard thereto before the determination of the rates the contractor shall be paid in respect of work carried out or expenditure incurred by him prior to the determination of the rates according to such rate or rates as shall be fixed by the Engineer-in-charge and in the event of a dispute the decision of the Superintending Engineer of the Circle would be final."

10. The case of the appellant is that clause 12 envisages alterations or additions within reasonable limits and an addition to the extent of 140 per cent in respect of the particular item alone is not covered by this clause and that in awarding Rs. 52,800 as extra payment for the additional work the arbitrator has not acted in disregard of clause 12 and he cannot be said to have exceeded his jurisdiction.

11. A clause making provision for additions and variations is generally found in building and constructions contracts. In Hudson's Building and Engineering Contracts (8th edn.) it has been observed : (pp. 294 and 296)

> "It may be that it can be inferred from the terms of the contract that the power to order extras, although apparently unlimited, is in fact limited to ordering extras up to a certain value and, in such a case, extras ordered in excess of that amount, although work of a kind contemplated by the contract, may yet be quite outside the terms of the contract."
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> "If the extra work ordered is outside the contract the terms of the contract have no application."

12. In this context it would be relevant to take note of the decision of the Court of Appeal in England in Parkinson (Sir Lindsay) & Co. Ltd. v. Commissioners of Works and Public Buildings ((1949) 2 KB 632 : (1950) 1 All ER 208). In that case the contractors had agreed with His Majesty's Commissioners of Works and Public Buildings to erect an ordnance factory according to the general conditions and specifications and bills of quantities and drawings annexed for the contract sum of Pounds 3,500,000 and under the general conditions of contract the Commissioners had power, at their absolute discretion, to modify the extent and character of the work or to order alterations of or additions to the works and it was the duty of the contractor to comply with the architect's instructions in this respect. In the contract it was also provided that it is probable that further work to the value of approximately Pounds 500,000 would be ordered on a measured basis under the terms of the contract. The contract was amended by a deed of variation and it was provided that exceptional methods should be used to hasten the work and that a system of uneconomic working should be introduced to bring about the completion of the factory by the date fixed by the contract. The Commissioners ordered work to be executed greatly in excess of the amount contemplated although not different in character from that covered by the varied contract, so that the works could not be completed until a year beyond the time anticipated and the actual cost of the contract was Pounds 6,683,056 which amount had been paid to them along with Pounds 300,000 the maximum profit under the deed of variation. During the progress of the work the contractors had complained to the Commissioners that they were being called on to execute more work than was contemplated by the varied contract and claimed that they were entitled to extra remuneration for the work in excess of that contemplated but they proceeded with the work at the request of the Commissioners leaving the issue to be subsequently decided by arbitration. The arbitrator found that the estimated cost of the work under the varied contract was Pounds 5,000,000 and awarded Pounds 90,298 as proportionate or reasonable profit or remuneration to the contractors for the additional work. The said was upheld by the Court of Appeal on the view that a term must be implied in the varied

contract that the Commissioners should not be entitled to require work materially in excess of the sum of Pounds 5,0000,000 and that such excess work having been done by the contractors, the Commissioners were liable to pat the contractors reasonable remuneration therefor. On behalf of the Commissioners reliance was placed on Condition 33 of the original contract which gave the Commissioners an unlimited power of ordering extras even to the extent of altering the character of the work. The contractors, on the other hand, placed reliance on the following observations of McCardie J. in Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft ((1918) 1 KB 331 : 118 LT 442) : (KB p. 335)

> "It is essential to remember, however, that words, even though general, must be limited to circumstances within the contemplation of the parties."

13. Accepting the contention urged on behalf of the contractors Asquith, L.J. observed : (KB p. 662)

> "[I]f the original contract plus the deed are read without any implied limitation on their literal meaning, the result, as indicated above, is that after Pounds 300,000 profit has been earned by the contractor, he can be compelled to labour like the Danaids without reward or limit, or any further "extras" which the Commissioners may elect to exact from him, 'till the last syllable of recorded time'.... Only the most compelling language would induce a court to construe the combined instruments as placing one party so completely at the mercy of the other. Where the language of the contract is capable of a literal and a more restricted, meaning, all relevant circumstances can be taken into account in deciding whether the literal or a more limited meaning should be ascribed to it."

14. Similarly Singleton, L.J. has observed (KB p. 673)

> "I find myself unable to agree with the submission of Mr. Rewcastle that, under the contract as varied by the deed of variation, the contractors would have been bound to continue making alterations and additions, if ordered, for years and years, without any extra payment by way of profit. That would have led to manifest absurdity and injustice, as Mathew, J. said in Bush v. Whitehaven Town & Harbour Trustees (I) ((1988) 52 JP 392 (Div Court)). There must be a limit."

15. Here also the question has often arisen whether the contractor under the variation clause is liable to execute the extra or additional qualities of the tendered items at the tendered rates to an unlimited extent. In some awards given by the arbitrators in the Central Public Works Department of the Government of India the variation of the tendered quantities under the variation clause in the contract has been restricted to 10 per cent beyond which the contractor was entitled to claims extras and these awards have been accepted and implemented by the government. It appears that the standard form of contract of the Central Public Works Department has been amended and now it specifically permits for a limit of variation called "deviation limit" up to a maximum of 20 per cent and up to such limit the contractor has to carry out the work at the rates stipulated in the contract and for the work in excess of that limit at the rates to be determined in accordance with clause 12-A under which the Engineer-in-charge can revise the rates having regard to the prevailing market rates (See : Gajaria's Law relating to Building and Engineering Contracts in India, 3rd edn., pages 410-12).

16. In the instant case, it appears that the Executive Engineer, the Superintending Engineer and the

Additional Chief Engineer in their letters dated November 9, 1961, February 23, 1962 and July 16, 1962 respectively have expressed the view that the additional work under the terms of the contract may be confined to 20 per cent and the appellant may be paid at the rates prescribed in the contract for 20 per cent of the additional work and for the extra quantity of additional work he may be paid remuneration at the increased rate taking into account the increased costs in execution of the said work on account of the peculiar nature of the work; while considering the claim of the appellant the arbitrator was required to consider the terms of the contract and to construe the same. It was, therefore, permissible for the arbitrator to consider whether clause 12 of the contract enables the Engineer-in-charge to require the appellant to execute additional work without any limit or a reasonable limit should be placed on the quantity of the additional work, which the appellant may be required to execute at the rate stipulated for the main work under the contract. For that purpose the arbitrator could take into consideration the practice prevalent in the Central Public Works Department in this regard as well as the correspondence between the appellant and the authorities including the letters dated November 9, 1961, February 23, 1962 and July 16, 1962 of the Executive Engineer, the Superintending Engineer and the Additional Chief Engineer recommending payment of remuneration at the increased rate for the additional works in excess of 20 per cent of the quantity stipulated in the contract. The appellant was claiming increased rate of Rs. 200 per 1000 cft. for the entire quantity of additional work. The arbitrator did not accept the said claim of the appellant in full and has partly allowed the said claim by awarding Rs. 52,800 which means that the arbitrator has awarded the increased rate only for a part of the additional work of hard rock cutting which the appellant was required to execute. The arbitrator was entitled to do so on the construction placed by him on clause 12 of the and, therefore, it cannot be said that in awarding the sum of Rs. 52,800 for the additional work the arbitrator has exceeded his jurisdiction and the award is vitiated by an error of jurisdiction. In the circumstances, we are unable to agree with the judgment of the learned Judges of the Division Bench of the High Court on this part of the claim.

17. The appeal is, therefore, allowed and the judgment of the Division Bench of the High Court setting aside the award of the arbitrator with regard to Item No. 1 of the claim relating to payment for additional work of hard rock cutting is set aside and the order passed by the learned Single Judge upholding the award of the arbitrator in this regard is restored. The appellant will be entitled to his costs.

Civil Appeal No. 323 of 1976

18. This appeal is directed against the order dated May 23, 1975 of the High Court of Delhi whereby the High Court rejected C.M. No. 1300 of 1974 filed by the appellant under Order XLI, Rule 21 read with Section 151 CPC, praying that the ex parte judgment dated March 27, 1973 in F.A.O. (O.S.) No. 35 of 1969 may be set aside and the appeal by re-admitted to its original number and the appeal be heard and decided on merits. The appellant has filed C.A. No. 322 of 1976 against the said judgment of the High Court dated March 27, 1973 in F.A.O. (O.S.) No. 35 of 1968. The said appeal has been allowed by the judgment given today. Since the judgment of the High Court dated March 27, 1973 has been set aside by this Court in C.A. No. 322 of 1976 this appeal does not survive and it is disposed of accordingly. No costs.

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