State of Orissa

Vs

B. N. Agarwala

Civil Appeals Nos. 3096 - 3097 of 1981

(B.P. Jeevan Reddy, G.N. Ray JJ)

24.11.1992

JUDGEMENT

B. P. JEEVAN REDDY, J.:-

1. Civil Appeal No. 3096 of 1981 arises from the judgment of a learned single Judge of Orissa High Court in Miscellaneous Appeal No. 253 of 1980. Civil Appeal No. 3097 of 1981 arises from Miscellaneous Appeal No. 254 of 1980. The appeals pertain to two identical contracts entered into between the State of Orissa and the respondent, Sri B. N. Agarwala. All the relevant facts and contentions are identical in both the appeals. It would, therefore, be sufficient if we refer to the facts in Civil Appeal No. 3096 of 1981.

2. An agreement No. 8-F2/67-68 was entered into between the State of Orissa (appellant) and the respondent for construction of Kukuteswar Minor Irrigation Project. The value of the agreement was Rs. 3,84,690/-. The work was completed on 11-9-69. On 8-8-77, the respondent claimed certain amount on account of extra work done by him, which dispute was referred to Sri B. N. Das, Superintending Engineer, as the sole Arbitrator. He made a reasoned award on 25-2-1980 granting a total sum of Rs. 1,59,298/-. This amount comprised of Rs. 61,086.61 p. towards interest and Rs. 98,212.09 p. towards the extra work done by the respondent. The interest amount Rs. 61,086.61 p. represented interest for the period 10-10-69 to 24-2-80. In other words this sum represented interest both for the pre-reference period as well as for the period the Arbitration proceedings were pending (Pendente lite interest). The Arbitrator directed that the said sum of Rs. 1,59,298/-should be paid within a period of three months, in default whereof it shall carry interest at the rate of 9 per cent per annum till the payment is made or till the passing of the decree by the Civil Court, whichever is earlier.

3. The appellant applied for setting aside the award while the respondent applied for making it the Rule of the Court. The learned Subordinate Judge overruled the objections raised by the appellant and made the award a rule of the Court. So far as interest is concerned, he directed, evidently under a mistake, that the amount awarded by the Arbitrator shall carry "interest at the rate of 6 per cent per annum as per the award." (As stated hereinbefore the arbitrator awarded interest at the rate of 9 per cent and not 6 per cent. For the period subsequent to the award, however, he awarded interest at the rate of 6 per cent).

4. On appeal, the learned single Judge of the Orissa High Court affirmed the judgment of the learned Subordinate Judge. He corrected the aforesaid error relating to rate of interest. He directed

that the sum of Rs. 1,59,298/- shall carry interest at the rate of 9 per cent per annum from 25-5-80 till the date of decree and at the rate of 6 per cent per annum from the date of the decree of the learned Subordinate Judge till the date of realisation.

5. The first contention urged by the learned counsel for the appellant before us relates to the very maintainability of the arbitration dispute with respect to the claims made by the respondent. The contention is that all the claims made by the respondent pertained to additional work. So far as additional work is concerned, the decision of the Superintending Engineer is final with respect to the amount payable therefor. A claim with respect to additional work done cannot be the subject matter of arbitration. This contention is based upon Clause-11 of the Agreement read with Clause 23. For a proper appreciation of the said contention it is necessary to set out Clause 11 in its entirety. It reads as follows :

> "Clause 11 :
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> The Engineer-in-Charge shall have power to make any alterations or addition to make any alterations or addition to 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 alteration shall not invalidate the contract and any additional 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 work bears to the original contract work and the certificate of the Engineer-in-Charge shall be, conclusive as to such proportion and if the additional work includes 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 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 rates of the district then the contract shall, within seven days of the date of .his receipt of his 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 by notice in writing be at liberty to cancell his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable. No deviations from the specification stipulated in the contract or additional items of works shall ordinarily be carried out by the contractor, nor shall any altered, additional or substituted work to be carried out by him, unless the rates of the substituted, altered or additional items have been approved and fixed in writing by the Engineer-in-Charge. The contractor shall be bound to submit his claim for any additional work done during any month on or before the 15th day of the following month accompanied by a copy of the order in writing of the Engineer-in-Charge, for the additional work and that the contractor shall not be entitled to any 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, incur any expenditure in regard thereof 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 Superintendent Engineer of the Circle will be final."

6. Clause 23 is the Arbitration Clause in the agreement. According to this Clause all disputes and claims arising out of or relating to the agreement shall be referred to the. arbitration of the Superintending Engineer of the State Public Works Department connected with the work nominated by the concerned Chief Engineer. For the present purpose only the opening words of Clause 23 are relevant. The opening words are "except where otherwise provided in the contract all questions and disputes ....."

7. The contention of the learned counsel for the appellant is that by virtue of the proviso contained in Clause 11, the decision of the Superintending Engineer of the Circle is final on any dispute relating to the rates payable for the extra work done by the Contractor. It is not possible to agree. Clause 11 is in three parts. The first part says that a contractor is bound to carry out such extra work as he may be called upon to do by the Engineer-in-Charge. The extra work shall have to be carried out subject to the same conditions in all respects as are applicable to the main work and at the same rates. If, however, the agreement does not contain rates for such work, the rates entered in the sanctioned schedule of the rates of locality during the relevant period shall be applicable. If, however, the schedule of rates also does not provide for such work the contractor should, within seven days of the order to do such additional work, inform the Engineer-in-Charge of the rates which he proposes to charge. If the Engineer-in-Charge does not agree thereto, it is open to the Engineer-in-Charge to get the said extra work done through some other agency.

8. The second part of Clause 11 says that no deviations from the specifications stipulated in the contract or additional items of work shall ordinarily be carried out by the contractor unless the rates therefor are approved and fixed in writing by the Engineer-in-Charge. The contractor must submit his claim for the additional work done during any month on or before the 15th of the following month accompanied by it copy of the order in writing of the Engineer-in-Charge for doing additional work. If he does not so submit the claim, he is not entitled to any payment.

9. The third part of Clause 11 contains the proviso relied upon by the counsel for the appellant before us. It says that if the contractor shall commence work and incur any expenditure before the rates shall have been determined "as lastly hereinbefore mentioned" he shall only be entitled to be paid for such work at such rate as may be determined by the Engineer-in-Charge. In the event of dispute, the decision of the Superintending Engineer is made final. It is evident from the use of the words "as lastly hereinbefore mentioned" that the proviso applies to second part of Clause 11 but not to the first part. The proviso contemplates a situation where additional work is done by the contractor before the rates are determined. It is only in respect of the rates payable for such work that the decision of Superintending Engineer is made final. It is not the case of the appellant/ State that the items for which the arbitrator has awarded the aforesaid amount was a work of the nature contemplated by the proviso. If so we see no bar to the dispute relating to rates for the additional work being referred to arbitration. The first contention is accordingly rejected.

10. The next contention of learned counsel for the appellant/State relates to the power of the Arbitrator to award interest for the pre-reference period. Reliance is placed upon the decision of this Court in Executive Engineer (Irrigation) v. Abnaduta Jena, (1988) 1 SCC 418 : (AIR 1988 SC 1520). Shri Bhagat, learned counsel appearing for the respondent, however, submits that the said decision is no longer good law in view of the Constitution Bench decision in Secretary, Irrigation

Department, Government of Orissa v. G. C. Roy, (1992) 1 SCC 508: (1992 AIR SCW 389). We cannot agree with Sri Bhagat. Both of us were members of the Constitution Bench which decided G. C. Roy. It was confined to the power of the arbitrator to award interest pendente lite. It did pot .pertain to nor did it pronounce upon the power of the arbitrator to award interest for the period prior to his entering upon the reference (pre-reference period). This very aspect has been clarified by one of us (B. P. Jeevan Reddy, J.) in his concurring order in I.A. No. 10 in Civil Appeal No. 1763 of 1989 etc. disposed of on 22-10-92 (reported in AIR 1993 SC 864). Accordingly, we hold following the decision in Jena that the arbitrator had no power to award interest for the pre-reference period in this case inasmuch as the award was made prior to coming into force of the Interest Act, 1978. (The Interest Act, 19781 came into force with effect from 19th August, 1981) So far as interest for the period during which the arbitration proceedings were pending (pendente lite interest) is concerned, the arbitrator does have the power to award the same as held in G. C. Roy (AIR 1992 SC 732). A request is made by Sri Bhagat to refer the matter to a larger Bench to decide the question relating to the power of the arbitrator to award interest for the pre-reference period even in cases where the award is made before the coming into force of Interest Act, 1978. Jena was decided by a Bench of three Judges. We do not also feel persuaded to refer the matter to a larger Bench.

11. The interest awarded by the arbitrator (Rs. 61,086.69 p.) pertains both to the pre-reference period as well as period during which the arbitration proceedings were pending (pendente lite). It is not clear from the material placed before us when did the arbitrator enter upon the reference. In the circumstances the matter has to go back to the learned Subordinate Judge for ascertaining the interest for the period prior to the arbitrator entering upon the reference (pre-reference period). The respondent shall not be entitled to interest for the pre-reference period as stated above. The award shall stand modified to the above extent. In all other respects, the award is affirmed.

12. The appeals are accordingly allowed in part. The matter is remitted to the learned Subordinate Judge for working out the direction contained in the preceding paragraph. No orders as to costs.

Appeals partly allowed.

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