State of U. P.

Vs

Ram Nath International Construction (P) Ltd.

Civil Appeal No. 6116 of 1994,

(S. C. Agarwal, G. B. Pattanktaswami JJ)

10.11.1995

JUDGMENT

PATTANAIK, J.

1. This appeal is directed against the judgment of the Allahabad High Court dated 16-12-1993 in First Appeal from Order No. 930 of 1991, arising out of an arbitration proceeding.

2. The respondent-contractor had entered into an agreement with the appellant for construction of non-overflow and overflow sections with bridge spillway and other appurtenant works of Maudaha Dam in Hamirpur District in the State of Uttar Pradesh. The agreement was entered into on 26-8-1985 and work commenced from 1-9-1985. The period stipulated for completion of the work was 42 months. In the year 1987 in respect of two items of work namely Items 13 and 15, it is alleged that the appellant changed the designs and drawings as a result of which the quantity of work became abnormally high compared to the estimated quantity of work in the agreement. On account of such abnormal increase of the quantity of work the contractor claimed higher rate than what was agreed to in the agreement. The State having refused to accede to the contractor's demand and disputes having arisen between the parties, the arbitration clause of the agreement was invoked and dispute was referred to the sole arbitration of the Joint Secretary and Joint Legal Remembrancer to the Government of Uttar Pradesh. Before the arbitrator the respondent-contractor made a claim of Rs. 91,56,750 for the increased quantity of work in respect of Item 13 executed till 30-4-1990 and Rs. 9,92,402.50 for the increases quantity of work in respect of Item 15 executed till 30-4-1990 together with interest @ 10% thereon. The entire basis of the claim of the contractor was that in respect of the quantity of work in excess of the estimated quantity in the agreement he is entitled to be paid @ Rs. 453.50 per cubic metre in place of the agreed rate of Rs. 243.00 for Item 13 and the rate of Rs. 739.55 per cubic metre in place of agreed rate of Rs. 460.00 for Item 15. It was alleged in the claim petition that the State of Uttar Pradesh has paid and is paying the agreed rate or Rs. 243.00 per cubic metre in respect of the additional quantity of work in Item 13 and similarly has paid and is paying @ 460.00 per cubic metre even in respect of additional quantity of work in respect of Item 15. According to the respondent-contractor, on account of substantial change in designs and drawings there has been abnormal increase in the quantity of work compared to the estimated quantity of work in the original agreement and in respect of such additional quantity of work he is not bound to be paid at the agreed rate but at an enhanced rate on the basis of the analysis of rate submitted by him. It was further averred that when the drawings and designs were changed, the contractor had resisted and prayed for the alteration in the rate but the authorities concerned had assured him orally for such change though ultimately did not agree to the same. It was also averred in the claim petition that under the agreement he was bound to carry out the work as per the directions of the authorities concerned and accordingly he has carried out the same.

3. The appellant-State filed written statement before the arbitrator denying its liability to pay at the revised rate as claimed by the contractor. It was admitted that there has been a change in the drawings and designs relating to Items 13 and 15 and on account of such change, the quantity of work in respect of the aforesaid two items has increased. But the claimant is not entitled to any enhanced rate, in view of the different clauses of the agreement itself. It was also averred in the written statement that the so-called variation in the quantity of work is covered by clauses 11.25 and 13.11 of the agreement and therefore the contractor is not entitled to any higher rate.

4. The learned arbitrator after analysing the different clauses of the agreement, came to the conclusion that the contractor could not have refused the work in accordance with the alterations and modifications in the drawings and designs. He further held that there has been a fundamental change in the drawings and designs which abnormally increased the quantum of work than the estimated quantum indicated in the agreement and under the agreement though the contractor cannot claim any excess rate for work up to the excess of 10%, but beyond the same the contractor would be entitled to claim a higher rate. The arbitrator accepted the analysis of rate given by the contractor and accordingly in respect of the quantity of work executed after the date of the completion of the work indicated in the agreement namely 28-2-1989, he granted as per the rate claimed by the contractor. In all he awarded a total sum of Rs. 90,21,765.65 together with interest @ 9% per annum from 21-5-1990 till the date of the award and further interest @ 6% per annum from the date of the award till the payment or till the decree, if any, passed on the basis of the order. The arbitrator also held that in respect of work executed after 30-4-1990 the claimant would be paid at the same rate i.e., Rs. 453.50 per cubic metre in respect of Item 13 and Rs. 739.55 per cubic metre in respect of Item 15 after adjusting the payment already made as per the rates given in the contract.

5. The contractor filed an application before the Civil Judge, Hamirpur for making the award a rule of court which was registered as Suit No. 53 of 1991. The appellant-State filed his objections challenging the legality of the award. The learned Judge being of the opinion that the court has no jurisdiction to interfere with an award of the arbitrator since the arbitrator had decided all the issues properly with detailed analysis as well as after perusing all the necessary documents, made the award a rule of court. The learned trial Judge also came to the conclusion that the arbitrator was fully within his powers to accept the analysis of rate submitted by the contractor which was in fact not disputed by the State and therefore there is no error in the award which could be interfered with by the court. On the question whether the objection filed by the State could at all be entertained the same having been filed beyond 30 days the Civil Judge came to the conclusion that the objections cannot be entertained and perused as the same was filed beyond the period of 30 days. With these conclusions the award having been made a rule of court and the objection of the State having been rejected, the State preferred an appeal in the High Court of Allahabad under Section 39 of the Arbitration Act. The High Court set aside the conclusion of the trial Judge with regard to the entertainability of the objection filed by the State and held that taking into account the magnitude of the claim of Rs. 1 crore and taking into account that the objection could not be filed on 23-3-1991 on account of lawyers' strike and 24-3-1991 was a Sunday, the objection filed on 25-3-1991 has to be considered on condoning the delay, in the interest of justice. But so far as the conclusion of the trial Judge on merits of the case is concerned the High Court refused to interfere with the decision of the trial Judge on the ground that the arbitrator has not committed any error in allowing the claim of the contractor as per the analysis of rates given by it in respect of the extra quantity of work and it is not permissible for the court within the parameter for exercise of its jurisdiction to interfere with the award. Thus appeal having been dismissed, the State has preferred the present appeal.

6. Mr. Sehgal, the learned Senior Counsel for the appellant, contended that in view of the escalation

clause in the contract itself, the arbitrator had no jurisdiction to allow the contractor's claim at a new rate on the basis of the analysis of rates and the award, therefore, is vitiated on that score. He further contended that even if it was permissible for the arbitrator to accept the analysis of rates submitted by the contractor for the excess quantity of work executed by him beyond the stipulated period of the contract, yet the arbitrator committed gross error in allowing the total claim without taking into account the payments already made to the contractor in accordance with the escalation clause of the contract and the award is, therefore, vitiated on that score. Mr. Sanghi, the learned Senior Counsel appearing for the respondent on the other hand contended that the quantity of work executed by the contractor being far more in excess of the anticipated quantity of work in the contract and such excess being on account of alteration of drawings and designs, the arbitrator was fully within his jurisdiction to accept the analysis of rates submitted by the contractor and award the contractor's claim. It was further contended that the State not having objected to the analysis of rates submitted by the contractor and award the contractor's claim. It was further contended that the State not having objected to the analysis of rates given by the contractor, the arbitrator was fully justified in awarding the claim of the contractor. Mr. Sanghi also contended that the payments already made to the contractor at the escalated rate in respect of the extra quantity of work in accordance with the terms of the contract is of no consequence since the contractor claimed the change of the basic rate which the arbitrator has allowed and on such basic rate the contractor would otherwise be entitled to the escalation in accordance with the clauses of the contract. According to Mr. Sanghi, the High Court rightly did not interfere with the award as no error appears to have been pointed out in the award itself.

7. The jurisdiction of the court to interfere with an award of an arbitrator is undoubtedly a limited one. The adjudication of the arbitrator is generally binding between the parties and it is not open to the court to attempt to probe the mental process by which the arbitrator has reached his conclusion. Award of an arbitrator can be set aside by a court only on the grounds indicated in Section 30 of the Arbitration Act. It is not open to the court to reassess the evidence to find whether the arbitrator has committed any error or to decide the question of adequacy of evidence and the court cannot sit on the conclusion of the arbitrator by re-examining and reappreciating the evidence considered by the arbitrator. At the same time the arbitrator is a creature of the agreement itself and therefore is duty-bound to enforce the terms of the agreement and cannot adjudicate a matter beyond the agreement itself. If the arbitrator adjudicates a claim of a contractor with reference to the clauses of the agreement itself whereby the agreement gets engrafted into the award, it will be open to the court to examine those clauses of the agreement and find out the correctness of the conclusion of the arbitrator with reference to those clauses. Bearing in mind the aforesaid parameters for exercise of jurisdiction by the court in examining the legality of an award of an arbitrator, the award in hand as well as the order of the subordinate Judge and that of the High Court requires scrutiny.

8. Admittedly under the agreement the completion period of work was 28-2-1989. The stipulated quantity of work in respect of Item 13 was 57,000 cubic meters and in respect of Item 15 it was 3500 cubic meters. In the course of execution of the contract, drawings and designs were changed as a result of which there was abnormal increase of the quantity of work and for such an increase of quantity of work when the contractor claimed a higher rate and gave the analysis before the arbitrator, which was not disputed by the State and the arbitrator accepted the rate, the court will not be justified in interfering with the same. It is not possible for us to accept the contention of Mr. Sehgal that under the terms of the agreement the contractor was not entitled to claim any higher rate. The arbitrator having considered all the relevant materials and there being no legal proposition which has formed the basis for acceptance of a higher rate and on the other hand the same being arrived at on account of the abnormal increase in the quantity of work which was on account of

change of drawings and designs, the court will not be justified in interfering with the same. The first contention of Mr. Sehgal, therefore, cannot be accepted.

9. But the second submission of Mr. Sehgal is unassailable. After expiry of the period stipulated in the agreement in respect of further quantity of work executed by the contractor, the State has been paying at a higher rate by calculating in terms of the escalation clause in the contract itself. When the claimant filed his claim petition before the arbitrator an assertion was made in paragraph 27 of the claim petition that the opposite party in respect of the extra quantity of work executed in Item 13 has paid and is paying at the rate of Rs. 243.00 per cubic meter though the claimant is entitled to a rate of Rs. 453.50 per cubic metre and hence the claimant is entitled to an additional amount at the rate of Rs. 210.50 per cubic metre (Rs. 453.50 - 243.00) and the amount thus comes to Rs. 91,56,750. Similarly, in respect of extra quantity of work in Item 15 it was averred in paragraph 30 of the claim petition that the opposite party in respect of this extra quantity has paid and is paying at the rate of Rs. 460 per cubic metre though the claimant is entitled to a rate of Rs. 739.55 per cubic metre and hence the claimant is entitled to an additional amount at the rate of Rs. 279.55 per cubic metre (Rs. 739.55 - 460.00) and the amount thus comes to Rs. 9,92,402.50. The claim petition was filed on 19-5-1990. But it was brought to our notice in the course of hearing of this appeal by Mr. Sehgal, learned Senior Counsel appearing for the appellant, that subsequent to 28-2-1989 which was the period contemplated under the agreement for completion of work, the contractor-claimant has been paid at an escalated rate in accordance with the escalation clause in the agreement itself. Neither the arbitrator nor any of the forums below have taken note of the aforesaid fact. Mr. Sanghi, learned Senior Counsel appearing for the respondent-contractor, however, vehemently urged that the claim of Rs. 453.50 per cubic metre in respect of Item 13 and Rs. 739.55 per cubic metre in respect of Item 15 was the basic rate claimed by the contractor and therefore any payment already made for excess quantity of work after the stipulated period in the agreement in accordance with the escalation clause in the agreement cannot be taken into account in adjudicating the claim of the contractor. We are unable to accept this contention of Mr. Sanghi inasmuch as the claimant himself, as has been stated earlier unequivocally in the claim petition averring that the claimant has been paid and is being paid at the old rate stipulated in the agreement and he is entitled to the higher claim. In respect of the excess quantity of work executed by the claimant subsequent to the completion period indicated in the agreement, when the claimant has made the claim at a higher rate and that claim is allowed by the arbitrator on the basis of analysis of rates given by him, then the amount already paid to him by the State in accordance with the escalation clause in the agreement has to be adjusted and the claimant would not be entitled to double benefit on that score. Unfortunately, this position has been lost sight of by the arbitrator as well as by the subordinate Judge and the High Court possibly because this has not been brought to notice by the State. Mr. Sanghi, learned counsel appearing for the respondent on instruction from his client does not dispute the position that subsequent to 28-2-1989, in respect of the quantity of work executed by the contractor, he has been paid at an escalated rate on the basis of calculation made in accordance with the escalation clause in the agreement. This being the position, we would have ordinarily set aside the award of the arbitrator and remitted the matter for recalculation. But in the course of hearing Mr. Sanghi, learned counsel appearing for the respondent, submitted that the matter may be decided by this Court since a considerable period has lapsed in the meantime and did not dispute the calculation-sheet that was filed by Mr. Sehgal, learned counsel appearing for the State, as well as the affidavit of Shri Ambika Prasad, Executive Engineer, Maudaha Dam, Construction Division. In the same affidavit after making necessary adjustments of payment, made at the escalated rate, it has been stated that the contractor would be entitled to the amount of Rs. 37,26,917.22 in respect of Item 13 for the extra work executed between 1-3-1989 to 30-4-1990 and a sum of Rs. 1,71,542.41 in

respect of extra quantity of work for Item 15 for the period between 1-3-1989 to 30-4-1990 and thus in all the claimant-contractor would be entitled to Rs. 38,98,459.63 in respect of the extra quantity of work executed by him for the period 1-3-1989 to 30-4-1990. Since the calculation made in this affidavit is not disputed and in view of the submission made by Mr. Sanghi appearing for the claimant-contractor, we modify the award of the arbitrator and direct that the claimant would be entitled to an additional sum or Rs. 38,98,549.63 in respect of the work executed by him up to 30-4-1990 and the same amount would also carry interest at the rate of 9% per annum from 21-5-1990 till payment is made, as awarded by the arbitrator himself.

10. The arbitrator has also held in the award that the claimant would be entitled to be paid at the same rate as indicated in the award in respect of the work executed subsequent to 30-4-1990. Mr. Sanghi, the learned Senior Counsel appearing for the contractor, submitted that no reference has been made to the arbitrator as to at what rate the contractor would be paid in respect of the work executed subsequent to 30-4-1990 and in fact the claimant-contractor had not made any claim on that score. And as such the said direction of the arbitrator must be held to be without jurisdiction. Mr. Sehgal, the learned Senior Counsel appearing for the State, also could not point out any material to indicate that the reference included the dispute with regard to the rate at which the contractor would be paid even subsequent to 30-4-1990. The arbitrator obviously cannot entertain and decide any dispute which has not been referred to it. In this view of the matter the direction of the arbitrator must be held to be without jurisdiction and we accordingly quash that part of the direction. In the net result, therefore, the appeal is allowed in part to the extent already indicated. There will be no order as to costs.