New India Civil Erectors (P) Ltd

Vs

Oil & Natural Gas Corporation

Civil Appeal No. 808 of 1997

(Sujata V. Manohar, B. P. Jeevan Reddy JJ)

17.02.1997

JUDGMENT

B. P. JEEVAN REDDY J

1 Leave granted. Heard Shri F. S. Nariman, learned counsel for the appellant and the learned Attorney General for the respondent-Corporation.

2. A contract was entered into between the appellant and the Oil & Natural Gas Corporation (ONGC), whereunder the appellant undertook to construct 304 pre-fabricated housing units at Panvel, Phase-I. The appellant commenced the construction but did not complete it even within the extended period. The respondent thereupon terminated the contract and got the said work done through another agency. Disputes arose between the parties in the above connection, each party raising claims against the other, which were referred for decision to two arbitrators joint arbitrators). By their award dated 18-6-1991, the arbitrators decided that while the ONGC shall pay to the appellant a sum of Rs 1,09,04,789, the appellant shall pay to the ONGC a sum of Rs 41,22,178. In other words the appellant was held entitled to a net amount of Rs 67,82,620 with interest at the rate of 18 per a cent per annum from the date of award till the date of payment or till the date of decree whichever was earlier. While the appellant applied for making the said award a Rule of the Court, the respondent-Corporation filed objections seeking to have the award set aside. The learned Single Judge overruled the objections of the respondent-Corporation and made the award a Rule of the Court. The Corporation appealed against the same, which has been partly allowed by the Division Bench.

3. The appellant had claimed various amounts under as many as 19 heads, while the respondent-orporation claimed certain amounts under three heads. The arbitrators rejected the appellant's claim under heads 3, 5, 7, 8, 10, 11, 12 and 18. They awarded various amounts under the other heads, the total of which came to Rs 1,09,04,789. So far as the respondent's claims are concerned, the arbitrators rejected claim 2 but accepted claim 1 (partly) and claim 3 (partly) and awarded various amounts totalling Rs 41,22,178.

4. In the appeal before the Division Bench the respondent-Corporation confined its attack only to claims 1, 4, 6, 9 and 13. The Division Bench rejected the respondent's contentions with respect to claims 1 and 13 but upheld the same with respect to claims 4, 6 and 9. Only the appellant has come to this Court challenging the judgment of the Division Bench. We shall deal with these three claims in their proper order.

5. Claim 4 : Appellant's claim 4 arises on account of the shortage of cement in the bags supplied by

the respondent. The appellant's case was that the Corporation had undertaken to supply cement to it in bags, each bag containing 50 kgs of cement, but as a matter of fact, the cement actually found in the bags was less. The appellant complained of the same to the officers of the Corporation from time to time and a record of the shortages has indeed been kept by the parties. On this count, the appellant claimed a sum of Rs 3,96,984.50p, against which the arbitrators awarded an amount of Rs 3,70,221.50 paise. The defence of the Corporation was that according to the stipulation contained in Schedule A to the Tender Notice, the Corporation was not to be held responsible for any variation in the weight of the cement in the bags supplied by them. The relevant stipulation read as follows :

> 'Ordinary Portland construction cement M. T. 830 Ex Commission s Godown, Greater Bombay.
>
> NOTE : 20 (Twenty) bags of cement shall mean one metric tonne for the purpose of recovery irrespective of variation in standard weight of cement filled in. bags."

6. The appellant's case, however, was that though the Schedule to the Tender Notice did contain the above stipulation, the appellant had, in its letter dated 5-3-1984, which was in the nature of a counter-offer, clearly stipulated that "ordinary portland cement; Rs 8.30 per metric tonne, (each 50 kg bag) " will be supplied by the Corporation "at site". The appellant had stipulated in the said letter that the terms set out by it therein "shall take a precedence over... tender conditions". It is pointed out by Shri Nariman that the said letter forms part of the contract between the parties and that indeed it is this letter which contains the arbitration clause whereunder the disputes between the parties have been adjudicated by the arbitrators. It is further submitted by the learned counsel that in their acceptance letter dated 10-1-1985, the respondent-Corporation merely stated that the cement will be supplied only at Bombay and not at the site, but did not say anything with respect to the stipulation in the appellant's letter dated 5-3-1984 (counteroffer) that each bag of cement supplied to it shall contain 50 kgs of cement.

7. The Division Bench has not referred to the letter dated 5-3-1984 nor to the acceptance letter dated 10-1-1985, but has rejected the appellant's claim only and exclusively with reference to the stipulation in the schedule to the Tender Notice. Mr F. S. Nariman submits that the Division Bench was in error in holding that the arbitrators exceeded their authority in awarding the said amount. According to him, the arbitrators merely construed the relevant stipulation as contained in the schedule to the Tender Notice read with the appellant's letter dated 5-3-1984 (counter-offer) and the Corporation's acceptance letter dated 10-1-1985 - which they were entitled to do. It is submitted that since the award is a non-speaking award (though it has awarded separate amounts under each head of the claim) no interference is permissible on the ground that the arbitrators have misconstrued the terms of the agreement. On the other hand, the learned Attorney General submitted that the stipulation aforesaid in the Tender Notice was not modified or qualified in any manner by the appellant's letter dated 5-3-1984 or by the respondent's acceptance letter dated 10-1-1985, and, therefore, the Division Bench was right in rejecting this claim as prohibited by the agreement between the parties. We are of the opinion that this appears to be a borderline case. It is possible to take either view. It must be remembered that in this case there is no formal contract and the terms of agreement have to be inferred from the Tender Notice and the correspondence between the parties. Since the attempt of the court should always be to support the award within the letter of law, we are inclined to uphold the award on this count (claim 4). Accordingly, we reverse the judgment of the Division Bench to the above extent. The amount awarded by the arbitrators under this claim is affirmed.

8. Claim 6 : The claim of the appellant under this head is in a sum of Rs 53,11,735.60p, against which the arbitrators have awarded an amount of Rs 49,91,327. The dispute between the parties is with respect to the method/mode of measuring the constructed area. The case of the respondent is that according to the tender conditions, as well as clause (10) of the aforesaid letter dated 5-3-1984 (written by the appellant to the Corporation), the area covered by balconies is liable to be excluded from the measurements. We may refer to clause (10) of the appellant's own letter a dated 5-3-1984 which reads as follows :

> "Mode of measurement. -We have based our price on the total built-up area of one floor (four flats) including staircase and common corridor but excluding balconies only. Hence work should be measured on the built-up area, excluding balcony areas."

The tender condition is to the same effect.

9. The above stipulation clearly says that total built-up area of a floor shall include the staircase and the common corridor but shall exclude balconies. It expressly provides that "work should be measured on the built-up area excluding balcony area". It is undisputed that in the plan of flats attached to the Tender Notice, balconies are provided. Shri Nariman contended that the said plans were modified later and that the flats as finally constructed, did not have any balconies and, hence, no question of excluding the balconies' area can arise. Shri Nariman could not, however, bring to our notice any agreed or sanctioned plan modifying the plan attached to the Tender Notice. The appellant could not have constructed flats except in accordance with the plans attached to the Tender Notice, unless of course there was a mutually agreed modified plan later - and there is none in this case. We cannot, therefore, entertain the contention at this stage that there are no balconies at all in the flats constructed and that, therefore, the aforesaid stipulation has no relevance. We must proceed on the assumption that the plans attached to the Tender Notice are the agreed plans and that construction has been made according to them and that in the light of the agreed stipulation referred to above, the areas covered by balconies should be excluded. In this view of the matter we agree with the Division Bench that the arbitrators overstepped their authority by including the area of the balconies in the measurement of the built-up area. It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account. We, therefore, affirm the decision of the Division Bench on this score (claim 6).

10. Claim 9 : The appellant claimed an amount of Rs 32,21, 099.89p under this head, against which the arbitrators have awarded a sum of Rs 16,31,425. The above claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. The appellant's claim on this account was resisted by the respondent-Corporation with reference to and on the basis of the stipulation in the Corporation's acceptance letter dated 10-1-1985 which stated clearly that "the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work". The Division Bench has held, and in our opinion rightly, that in the face of the a said express stipulation between the parties, the appellant could not have claimed any amount on account of escalation in the cost of construction carried on by him after the expiry of the original contract period. The aforesaid stipulation provides clearly that there shall be no escalation on any ground whatsoever and the said prohibition is effective till the completion of the work. The learned arbitrators, could not therefore have awarded any b amount on

the ground that the appellant must have incurred extra expense in carrying out the construction after the expiry of the original contract period. The aforesaid stipulation between the parties is binding upon them both and the arbitrators. We are of the opinion that the learned Single Judge was not right in holding that the said prohibition is confind to the original contract period and does not oprate thereafter. Merely because time was made the essence of the contract and the work was contemplated to be completed within 15 months, it does not follow that the aforesaid stipulation was confined to the original contract period. This is not a case of the agreement. It is a clear case of the arbitrators acting contrary to the specific stipulation/condition contained in the agreement between the parties. We, therefore, affirm the decision of the Division Bench on this count as well (claim 9).

11. So far as the position of law on the subject is concerned, there is hardly any dispute between the parties. It is sufficient to refer to the well-considered decision of this Court in Sudarsan Trading Co. v. Govt. of Kerala [(1989) 2 SCC 38 : AIR 1989 SC 890