

Army Welfare Housing Organisation

Vs

Gautam Construction & Fisheries Ltd.

Ias Nos. 13-24 In Civil Appeals Nos. 11597-600 of 1995

(Dr. A. S. Anand, D. P. Wadhwa JJ)

17.09.1998

JUDGMENT

D. P. WADHWA, J.

1. IAs Nos. 17 to 20 of 1998 are objections filed by M/s Gautam Construction and Fisheries Ltd. (GC&FL) under Sections 15, 17 and 33 of the Arbitration Act, 1940 (for short "the Act") to the award dated 9-9-1997 of the sole arbitrator, Justice V. Khalid, a retired Judge of this Court. IAs Nos. 21 to 24 are the objections similarly filed by the Army Welfare Housing Organisation (AWHO) against the same award.

2. GC&FL in their objections seek directions for modification of the award to correct an error with regard to wrong deduction of Rs. 30,00,000 twice by the arbitrator from their Claims 1 and 13 in their statement of claims. They have also claimed interest @ 18% per annum on the amount of the award in their favour till payment. AWHO in their objection also seek modification of the award stating that their claim for anticipated liability towards completion of the contract was wrongly rejected by the arbitrator when some of the amounts claimed were towards "firm liability". Both parties disputed the objections of each other to the award as aforesaid.

3. A little background will be necessary to understand the objections raised by the parties. There was a contract entered into between them for construction of a certain number of dwelling units by GC&FL for AWHO on the land belonging to GC&FL. The contract contained an arbitration clause. Disputes arose between the parties resulting in cancellation of the contract by AWHO and issuance of publication of notice for retendering of the contract for the balance of the work. Instead of seeking appointment of an arbitrator under the terms of the contract, GC&FL filed an application under Section 20 of the Act and also filed an application under Section 41 of the Act seeking interim directions. These proceedings were filed in the Madras High Court. The learned Single Judge by order dated 18-9-1995 appointed a retired Judge of the Madras High Court as the sole arbitrator and at the same time restrained AWHO from retendering the work pending disposal of arbitration proceedings. The arbitration agreement under the contract prescribed a different mode for appointment of an arbitrator but that is not relevant now and it is unnecessary for us to examine that aspect. Aggrieved by the judgment of the High Court, AWHO sought leave to appeal to this Court which was granted by order dated 4-12-1995 and the appeal itself was also heard and disposed of on the same day. With the consent of the parties, this Court then appointed Justice V. Khalid, a retired Judge of this Court, as the arbitrator and also authorised him to take any help from any technically qualified person. Liberty was given to the parties to approach the arbitrator for any interim relief including vacation of the injunction order granted by the High Court regarding retendering of the work. It was also directed that the arbitrator would file the award in this Court

only and the other courts were interdicted from interfering in the arbitration proceedings.

4. After entering into the reference, the arbitrator gave an interim award on 8-5-1996 whereby he vacated the order of injunction granted by the High Court in its judgment dated 18-9-1995. This interim award when filed in this Court was made rule of the court as no party filed any objection to the same. Thereafter, the arbitrator gave his final award on 9-9-1997 and on notice of filing the same given to the parties, they filed their objections now under consideration.

5. The award is quite elaborate. It takes into account numerous details. The arbitrator framed as many as 10 issues and then went on to examine each of the claims put forward by the parties with reference to the record before him. In the objections filed by AWHO, it seeks remission of the award. The objections are though under Sections 15, 17 and 33 of the Act. In the course of arguments, it was submitted by Mr. Tewari, learned counsel for the AWHO, that the award be remitted back to the arbitrator which would be under Section 16 of the Act, though in the prayer modification of the award under Section 15 is sought. AWHO submitted that though it claimed certain amounts as "firm liability" after the contract was cancelled, there were certain "anticipated expenses" required to complete the contract. It was submitted that the arbitrator treated even the firm liability as in the nature of elements of anticipated expenses and disallowed the same. It was submitted that on this account, the arbitrator committed a mathematical error. It is not the case of AWHO that the arbitrator did not examine or did not take into account the claim put forward by AWHO. It is not possible for us to reappraise the evidence produced before the arbitrator and then ourselves coming to the conclusion whether a certain amount claimed was towards "firm liability" or in the "nature of anticipated expenses". Once the arbitrator had held that the claim would be in the "nature of anticipated expenses", it is difficult for us to hold the same otherwise. It cannot be said that the award is not good on the face of it on that account. The objections of AWHO have no force and IAs Nos. 21 to 24 are rejected.

6. Under the terms of the contract, GC&FL would be entitled to a total amount of Rs. 54,95,271.72 as retention money from the total contract amount. The arbitrator found that under the contract, GC&FL executed work of the value of Rs. 4,52,10,002 and as such GC&FL would be entitled to retention money to the extent of 63.47%. Thus, from the retention money of Rs. 54,95,271.72 which GC&FL would be entitled to on completion of the contract, a sum of Rs. 34,87,848.90 is now due to them being 63.47% of Rs. 54,95,271.72. On completion of 50% of the work, GC&FL had already received Rs. 30,00,000 as retention money in three instalments. Thus, GC&FL would be entitled to the balance amount of Rs. 4,87,848.90 towards the retention money. The arbitrator found that under Claims 1 and 13 of GC&FL, an amount of Rs. 7,08,893.60 would be due to GC&FL from AWHO. This is how the arbitrator arrived on this figure :

"The ultimate position is as follows :

# RAR bill 23 demand Rs.1. Value of work executed 4,50,44,002.352. Value of extra works 1,66,000.003. Total 4,52,10,002.354. Value of materials lying at site 29,57,657.005. Grand total 4,81,67,659.706. Percentage of work done 63.47% Deduction Rs.(a) Retention money 2,00,000(b) Cost of Schedule 'B' 1,69,37,615 materials supplied by AWHO(c) Income tax 11,52,990(d) Interest on Rs. 18 6,26,117 lakhs' advance(e) Payment for RAR bills 2,47,55,521 up to Bill No. 22(f) Advance of retention 30,00,000 money after 50% work done(g) Advance made at site 12,74,372 4,79,46,615.00 Balance receivable 2,21,044.70(h) Proportionate retention 4,87,848.90 money payable at 63.47% of Rs. 54,95,271.72 less Rs. 30,00,000

already paid ----- Total balance receivable 7,08,893.60 -----  
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Thus, sum of Rs. 7,08,893.60 is allowed under Claims 1 and 13."

7. The objection of GC&FL is that an amount of Rs. 30,00,000 has been deducted twice by the arbitrator which was a mistake apparent on the face of it and as such this Court should modify the award and grant a further amount of Rs. 30,00,000 to that already awarded by the arbitrator under Claims 1 and 13. We do not think that Mr. Thakur is right in his approach. GC&FL is entitled to Rs. 4,87,848.90 towards balance of retention amount as an amount of Rs. 30,00,000 GC&FL had already received. GC&FL cannot be paid Rs. 30,00,000 twice over. In the claim made by GC&FL, it should have deducted Rs. 30,00,000 which it had already received. As a matter of fact, the arbitrator observed as under :

"Claim 1 suffers from a serious flaw and the same can be rejected outright. On a perusal of the claim and the various items shown therein, it is seen that the petitioners have either inadvertently or deliberately omitted to deduct Rs. 30 lakhs towards retention money obtained by them on three occasions for 50% of the work done. If this Rs. 30 lakhs is deducted from the claim made in Claim 1, the claim is reduced to a minus figure. This error, however, is seen corrected in the petitioners' reply to the respondents' Claim 1."

8. In fact, in the calculations aforesaid, under Item (h), the arbitrator could have said : "Balance of the retention money payable - Rs. 4,87,848.90." Retention money due to GC&FL is from the whole of the value of the contract. Total of retention money as arrived at by the arbitrator is Rs. 54,95,271.72 which is payable on completion of the contract by AWHO. Since GC&FL executed only 63.47% of the value of the contract, they became entitled to Rs. 34,87,848.90 being 63.47% of Rs. 54,95,271.72. Having already received Rs. 30,00,000 GC&FL became entitled to the balance amount of Rs. 4,87,848.90 which the arbitrator allowed them under the award.

9. As far as the claim of interest is concerned, the award has already allowed the same and no objection thereto has been filed by AWHO or even by GC&FL on the claim due to AWHO under the award. IAs Nos. 17 to 20 of GC&FL are rejected.

10. IAs Nos. 13 to 16 filed by GC&FL seeking directions for modification of the award and for grant of interest also stand dismissed.

11. Accordingly the award dated 9-9-1997 is made rule of the court and decree in terms thereof will be passed. Since both the parties have failed in their objections to the award, they shall bear their own costs.