SUPREME COURT OF INDIA

Asian Techs Ltd.

Vs.

Union of India

C.A.Nos.311-312 of 2003

(Markandey Katju and Asok Kumar Ganguly JJ.)

07.09.2009

JUDGMENT

Markandey Katju, J.

1. These appeals have been filed by special leave against the impugned judgment and order dated 21st March, 2002 of the Kerala High Court in MFA No. 452 of 1997.

2. Heard learned counsel for the parties and perused record.

3. The appellant, Asian Techs Ltd entered into an agreement dated 2.9.1986 with the Union of India for construction of 'Provision of Lab and Administrative Block' etc for NPOL at Kakkanad, Cochin. The probable amount of contract was Rs. 3,58,96,665/-, and the construction was to be completed before 8.9.1988. The period of the contract was 24 months. Ext R1 is the agreement and Ext R1(a) is the General conditions of contract known as IAFW - 2249. According to the appellant, due to the delay caused by the respondent, the project could not be completed by 30.6.1990. According to the appellant, the delay was because the site of the work proposed was changed by the respondent subsequent to the signing of the agreement. Also, the design and structural particulars of the building were fundamentally altered by the respondent by omitting the basement floor itself. The respondent nominated the suppliers of prime cost items belatedly. They did not finalize the design and structural particulars of the work within the period of the contract which expired on 8.9.1988 and dragged on the works, resulting in suspension of the ongoing works and making the labour and machinery items idle. By efflux of time the cost of labour, fuel, materials etc. increased. The respondents assured to settle the rates for extra items across the table and persuaded the petitioner to continue to carry out and complete the works. The respondent No. 2 allowed unconditional extension of time at the first instance on 10.11.1988 and then from time to time, without levy of liquidated damages. There was no agreement of whatsoever nature in respect of rates for works carried out between 8.9.1988 and 30.6.1990, or on rates for extra and altered items. The respondent did not pay even at the agreed rates in the agreement in respect of certain items and avoided reference to rates in the MES schedule of rates for many other items, for which rates were to be derived.

The contract stipulated settlement of rates for extra items of work involved by Respondent No. 2, being the accepting officer.

4. The respondents prepared the last bill on 27.2.1991 for works completed on 30.6.1990, which was received under protest on 7.5.1991. The general condition 7(d) of IAFW 2249 forming part of the contract reserved rights of the petitioner and Respondent No. 2, to correct any mistake in fixation of rates at any time, even after receipt of the last payment. It is alleged that the respondent No. 2 failed to communicate any decision on objections to incorrect fixation of rates, duly notified from time to time by the petitioner. The rates were fixed by a board of subordinate officials, behind the back of the petitioner, violating the contract, and thus huge amounts due and payable to the petitioner were wrongfully withheld.

5. The petitioner invoked the arbitration clause in the agreement for settlement of the disputes and differences which arose and sent a demand notice dated 10.12.1991 for payment of Rs. 1,24,58,108/- together with interest thereon. Respondent No. 2 on 15.6.1992 intimated readiness and willingness to refer the disputes and differences as specified in the notice dated 10.12.1991 to arbitration. The Chief Engineer Air Force was appointed the sole Arbitrator on 15.12.1992 and the respondents participated in arbitration proceeding without any demur or protest.

6. The Sole Arbitrator, found patent mistakes in fixation of rates of extra items and determined unpaid amounts and passed a non-speaking award dated 30.12.1993 in favour of the petitioner for payment of Rs. 39,75,484/- together with past, pendente lite and future interest and rejected the counter claims. The Subordinate Judge's Court, Ernakulam passed a decree in terms of the Award, on 8.10.96, while dismissing the application for setting aside the award by a common judgment. The respondents filed M.F.A. No. 452 of 1997 and CRP No. 1906 of 1998 before the High Court of Kerala, Ernakulam, challenging the decree in terms of the award. The High Court set aside the non-speaking Award, except in respect of claim No. 12 for payment of Rs. 1,20,000/- wrongfully withheld by the respondents.

7. It is alleged by the appellant that the High Court erroneously allowed C.R.P. No. 1906 of 1998, contrary to the law declared by this Court in *Essar Constructions vs. N.P. Ramakrishna Reddy*[1] 103. In paragraph 33 of the said judgment it was observed that an application under Section 115 of the Code of Civil Procedure, 1908, did not lie to challenge a decree passed in terms of the Award.

8. The appellant has further alleged that the High Court ignored a long line of decisions of this Court declaring that it is not open to the Court to examine the correctness of a non-speaking award on a reappraisal of evidence, nor for that purpose was it permissible to interpret the contract. It is alleged that the High Court did not refer to the memorandum of appeal filed by the respondents. It is alleged that the High Court without stating any reason rejected the contention of the petitioner that the Commander Works Engineer (CWE) was not the competent authority to fix the rates for extra, deviated and additional items under the contract entered into with Respondent No. 2 and beyond the period of contract and that his

pecuniary jurisdiction was only up to Rs. 20,000/-, stipulated in MES Regulation, 1968 and that no final decision on the objections of the petitioner against erroneous fixation of rates was ever communicated by the Chief Engineer, who is the accepting officer. It is alleged that the High Court erroneously assumed that extensions of time granted by Respondent No. 2. from time to time, deprived the petitioner of its right for due payment at the then prevailing rates for delayed works at the instance of the respondents.

9. The High Court by the impugned order allowed the appeal and revision making the following observations:

> "We, therefore, hold that the award passed by the arbitrator in respect of claim Nos. 1 to 3, 5, 9, 17, 19, 21, 23, 24, 26, 30, 33, 35, 37, 38, 40, 41, 44 and 46 is against the conditions agreed to by the contracting parties and in conscious disregard of the terms of the contract and also the arbitration clause from which the arbitrator derives his authority.
>
> We are, however, not interfering with the award in respect of claim No. 12 alone, which in our view is binding on the appellants. We hold that the arbitration clause 70 was conditional one giving finality to the decisions of CWE as per the various provisions, clauses 62(G) and 11(C) of the contract. The award of the arbitrator and the orders of the court below in Arbitration O.P. Nos. 4 and 18 of 1994 to the Extent to which they are covered by clauses 62(G) and 11(C) except claim No. 12 are set aside and the Arbitration O.P. No. 18 of 1994 filed by Union of India is allowed as above. The appeal and the revision are allowed as above. In the facts and circumstances of this case, we are not awarding costs."

10. It can be seen that the High Court has set aside the arbitrator's award holding that under the finality clause under clauses 11(C) and 62(G), the decision of the Commander Works Engineer (CWE) is final and binding and has been exempted from the purview of the arbitration clause, which is clause 70 of the contract. Thus the High Court held that the arbitrator travelled beyond the terms of reference.

11. In this connection we may refer to clause 70 of the contract which is the arbitration clause. The said clause reads as follows:

> "70. Arbitration
>
> All disputes, between the parties to the Contract (other than those for which the decision of the CWE or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Office to be appointed by the authority mentioned in the tender documents."
>
> Clause 11 of the contract reads as follows:

"11. Time, delay and Extension

(A) Time is of the essence of the contract and is specified in contract documents or in each individual Works Order.

As soon as possible after the contract is let or anysubstantial Works Order is placed and before work under it has begun, the G.E. And the Contractor shall agree upon a Time Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof, and/or the Contract or Works order as a whole.

(B) If the works be delayed:

(a) by reason of non-availability of Government stores mentioned in Schedule 13; or

(b) by reason of non-availability or breakdown of Govt. Tools and Plant mentioned in Schedule 'C' then, in any such event, notwithstanding the provisions hereinbefore contained, the G.E. May in his discretion grant such extension of time as may appear reasonable to him and the Contractor shall be bound to complete the works within such extended time. In the event of the Contractor not agreeing to the extension granted by the Garrison Engineer, the matter shall be referred to the Accepting Officer (or CWE in case of contract accepted by Garrison Engineer) whose decision shall be final and binding.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted."

Clause 62(G) of the Contract states as under:

"(G) For all Contracts -

If any work, the rate for which cannot be obtained by any of the methods referred to in paras (A) to (E) above, has been ordered on the contractor, the rate shall be decided by the G.E. On the basis of the cost to the Contractor at Site of Works plus 10% to cover all overheads and profit. Provided that if the contractor is not satisfied with the decision of the G.E. He shall be entitled to represent the matter to the C.W.E. Within seven days of receipt of the G.E.'s decision and the decision of the C.W.E. Thereon shall be final and binding. If any alterations or additions (other than those authorised to be executed by day work or for an agreed sum) have been covered up by the Contractor without his having given notice of his intention to do so, the Engineer-in-Charge shall be entitled to appraise the value thereof and in the event of any dispute the decision of the G.E. Thereon shall be final and binding.".

12. In the present case it is apparent that the delay in the execution of the contract was solely due to the default of the respondents. In this connection we may refer to the following facts.

"(1) The Assistant Garrison Engineer sent letter dated 21.06.1988 admitting suspension of works of beams & of main roof slab building, due to non-finalization of design.

(2) The user of the building i.e. NPOL directed stoppage of many items of work pending their final decisions on them by letter dated 17.09.1988.

(3) On 26.9.1987 the appellant notified the respondents about the idling due to non-finalization of various structural particulars, and demanded compensation. The appellant again sent notice dated 9.2.1988 intimating the respondent about idling at the site and losses due to non-finalization of designs and particulars. The Assistant Garrison Engineer sent a letter on 21.6.1988 admitting suspension of works of beams and of main roof slab building due to non-finalization of design.

(4) On 17.9.1988 the user of the building i.e. NPOL directed stoppage of many items of works pending their final decision on them. Also, by letter dated 26.9.1988 respondent No. 3 directed stoppage of construction of many items of work pending their final decision on structural particulars.

(5) On 10.11.1988 respondent No. 3 intimated unconditional grant of extension of time from 8.9.1988 to 31.1.1989 by respondent No. 2.

(6) The appellant by letter dated 24.11.1988 requested respondent Nos. 2 & 3 to settle accounts of the value of the works already carried out, to make payment in terms of the agreement and to close the agreement due to continued suspension of works and increased cost of construction due to efflux of time so as to arrange the remaining works through separate work orders

(7) The Assistant Garrison Engineer of respondent No. 3 sent a letter dated 11.10.1989 assuring the petitioner to settle rates across the table and directed to carry out such items, agreeing to take up objections as to rates, for settlement by the appropriate authority.

(8) Respondent No. 3 on 23.11.1990 wrote to the appellant directing it to forward paid vouchers for items to take up the objections as to rates before the respondent No. 2, who was the Accepting Officer.

(9) The last bill amount of Rs. 7,87,143/- was paid by respondent No. 3 which was received by the appellant under protest.

(10) The appellant issued demand notice for payment of Rs.1,24,58,108/- being the unpaid amount allegedly due and payable to it."

All the above facts show the repeated defaults by the respondents due to which the

contract could not be completed in time.

13. The letter dated 24.11.1988 makes it clear that the appellant was not ready to carry out the work beyond the contracted period otherwise than on separate work orders, and the subsequent correspondence like the letter dated 11.10.1989 makes it clear that it was on the specific assurance given by the respondent to the appellant to continue the work and that the rates would be decided across the table that the appellant went ahead with the work. Hence, in our opinion it is now not open to the respondent to contend that no claim for further amount can be made due to clause 11(C) and that the arbitrator would have no jurisdiction to award the same.

14. Clause 62(G) read with clause 7 make it clear that the finality provided under clause 62(G) applies only to cases of 'deviation' and not in a case when there is a material alteration and addition in the work done, as is clear from the correspondence between the parties in the present case.

15. Moreover, Regulation 439 of the MES Regulations 1968 fixes the pecuniary jurisdiction of the CWE at Rs. 20,000/- only. It is evident that the CWE has no jurisdiction to decide the dispute where the valuation is above Rs. 20,000/-, as in the present case. The finality of the decision of the CWE applies only where the dispute is not exceeding Rs. 20,000/-. Hence, in our opinion, the arbitrator was within his jurisdiction to decide the matter in question.

16. It is well-settled that in the case of non-speaking awards under the Arbitration Act, 1940 the Court has very little scope of interference vide *State of Rajasthan vs. Nav Bharat Construction Co.*[2], *Raipur Development Authority vs. Chokhamal Constructions*[3], *Arosan Enterprises Ltd. vs. Union of India*[4], *Ispat Engineering vs. Steel Authority of India*[5], *D.D. Sharma vs. Union of India*[6].

17. It has been held by this Court in *National Insurance Company Ltd vs. Boghara Polyfab Pvt. Ltd.*[7] that even in the case of issuance of full and final discharge/settlement voucher/no-dues certificate the arbitrator or Court can go into the question whether the liability has been satisfied or not. This decision has followed the view taken in *Chairman and Managing Director, NTPC Ltd. vs. Reshmi Constructions, Builders and Contractors*[8] (vide paragraphs 27 and 28).

18.Apart from the above, it has been held by this Court in *Board of Trustees, Port of Calcutta vs. Engineers-De-Space-Age*[9], that a clause like clause 11 only prohibits the department from entertaining the claim, but it did not prohibit the arbitrator from entertaining it. This view has been followed by another Bench of this Court in Bharat Drilling & Treatment Pvt. Ltd. vs. State of Jharkhand & others in Civil Appeal No. 10216 of 2003 decided on 20th August, 2009.

19. For the reasons given above we are not in agreement with the view taken by the High Court that the award of the arbitrator was without jurisdiction. In the facts and circumstances

of the case, we allow these appeals and set aside the impugned order of the High Court and restore the award of the arbitrator. No costs.

[1]*(2000) 6 SCC 94*
[2]*(2006) 1 SCC 86*
[3]*(1989) 2 SCC 721*
[4]*(1999) 9 SCC 449*
[5]*(2001) 6 SCC 347*
[6]*(2004) 5 SCC 325*
[7]*(2009) 1 SCC 267*
[8]*(2004) 2 SCC 663*
[9]*(1996) 1 SCC 516*