SUPREME COURT OF INDIA

Union of India

Vs.

Concrete Products & Const.Co.

C.A.No.2950-2951 of 2014

[Surinder Singh Nijjar] [Fakkir Mohamed Ibrahim Kalifulla]

03.03.2014

JUDGMENT

SURINDER SINGH NIJJAR, J.

1. Leave granted.

2. These appeals impugn the final judgment and decree dated 21st March, 2012 passed by the High Court of Judicature at Madras in OSA No. 44 & 45 of 2012 and M.P. No. 1 of 2012, whereby the letters patent appeals of the Union of India were dismissed. The appellant had entered into agreements with the respondents on 30th January, 1983 and 30th March, 1984 for supply of mono block concrete sleepers (in short "Sleepers"). The agreements were renewed from time to time under which the Union of India agreed to pay specified rates for supply of each sleeper. The agreements/contracts also provided that the rates payable shall be based on certain standard rates of principal raw materials, such as cement, High Tensile Steel (HTS) wires, molded steel, etc. The contracts further provided that whenever the cost of the principal raw materials increased or decreased, the contract price for sleepers shall also correspondingly be increased or decreased with effect from the date of such increase or decrease. The agreements/contracts also provided for escalation, subject to certain conditions prescribed under Clause 11 of the Contract. The contracts/agreements further provided that the respondents must exercise utmost economy in the purchase of raw materials and that the escalation will be admitted on the basis of actual price paid for the respective raw material. This was subject to the ceiling on the price. As per Clause 12.2(c), ceiling was fixed "in the case of raw materials not covered by either of the above, the lowest price (for destination)

arrived at on the basis of at least three quotations obtained by the Contractor for each supply from various established sources of supply of the respective raw materials".

3. The respondents/contractors purchased HTS wires from established sources in terms of the various clauses of the contract. The material was used in the manufacture of sleepers. Payment for the sleepers was made by the contractors at the lowest price quoted by the suppliers. The quotation was also scrutinized alongwith the supporting documents. The Railway authorities release the payment to the respondent contractors only upon their satisfaction, upon scrutiny of all the relevant documents.

4. A new contract was entered into between the parties in May, 1997. The railway administration changed the policy and allowed the respondents/contractors to purchase the HTS wires, subject to escalation as noticed above. By letter dated 12th July, 1997, the railways administration informed the respondents that the Railway Board had found that excess payments had been made between 1989 and November, 1994 under escalation clause for HTS wires. It was stated that the amounts paid to the contractors were more than the prevalent market price. Therefore, a sum of Rs. 1,80,92,462/- was recoverable from M/s Concrete Products and Construction Company, respondent in C.A. No. _____ (arising out of SLP(C) No. 5384 of 2013) and a sum of Rs.1,78,09,789/- was recoverable from M/s. Kottukulam Engineers Private Limited, respondent in C.A. No. _____ (arising out of SLP(C) No. 5385 of 2013). It was also pointed out that the aforesaid sums would be recoverable from the sums due and payable to them in the current/running contracts.

5. The contractors (respondents herein) challenged the aforesaid recovery by filing Writ Petition No. 11805 and 10814 of 1999, before the High Court of Madras. The railway administration took up the preliminary objection, pleading that the writ petition is not maintainable as the dispute has to be referred to arbitration. The objection of the appellant was accepted. The High Court appointed a Former Judge of the Madras High Court as the arbitrator to adjudicate the dispute. The contractors/respondents herein challenged the aforesaid order of the learned Single Judge by filing Writ Appeal Nos. 251 and 252 of 2000, on the plea that the arbitrator had to be appointed in terms of the agreement. By order dated 22nd March, 2000, the writ appeals were allowed, and the order of the learned Single Judge was set aside. The matter was remanded back to the Single Judge for disposal in terms of the agreement.

> On remand, the learned Single Judge, instead of referring matter to arbitration in terms of the contract between the parties allowed the writ petitions filed by the respondents herein and directed the railway authorities to refund the sum of Rs.1,69,78,883/- and Rs.1,78,09,789/- to the respondent firms, respectively with interest thereon from the date of withholding till the date the same is refunded. The order was directed to be complied within a period of 4 week from the date of the receipt of the order. This order was again challenged by the railway administration by filing, first of all, Writ Appeal Nos. 2822 and 2823 of 2001. Subsequently, writ appeal miscellaneous petition No. 21103 and 21104 of 2001 were also filed in the aforesaid two writ appeals, seeking stay of the judgments under appeal. On 30th April, 2004, the Division Bench dismissed the writ appeals as well as the miscellaneous petitions.

6. The railway administration challenged the aforesaid order of the Division Bench, before this Court by filing SLP No. 18244 and 18245 of 2004. Special leave was granted in both the special leave petitions and the same were converted to Civil Appeal Nos. 2999 and 3000 of 2005. By a short order passed on 2nd May, 2005, the disputes between the parties were referred by this court for adjudication by an Arbitration Tribunal consisting solely of Mr. Justice K. Venkataswami, a former Judge of this Court. This order was passed without going into the merits of the disputes and the submissions made by the learned Solicitor General on behalf of the railways, that in view of the specific condition contained in the contract, the dispute cannot be referred to an arbitrator other than the authority referred to in the contract. This Court directed that the matter shall be referred to Mr. Justice Venkataswami. It was, however, made clear that the order shall not be treated as a precedent. Pursuant to the aforesaid order of this Court, the matter ultimately reached the arbitrator. At the conclusion of the arbitral proceedings, the final award was rendered on 24th June, 2006. The sole arbitrator directed the appellants to refund the amount awarded as follows:-

> "In the result I direct the Respondents to refund a sum of Rs.1,78,09,789/- recovered from the Claimants and interest of Rs.2,38,28,960/- and subsequent interest at 18% P.A from 1.9.2005 on Rs. 1,78,09,789/- till date of payment in Kottukulam Engineers Pvt. Ltd. matter. Ana a sum of Rs.1,69,78,883/- and interest of Rs.2,25,25,513/- and subsequent interest at 18% P.A from 1.09.2005 till date of payment in m/s Concrete Product & Construction Company Trivalam."

The counter claims made by the appellants were dismissed. The railway administration challenged the common arbitration award in O.P. No. 142 & 143 of 2007 under Section 33 of the Arbitration and Conciliation Act, 1996 before High Court of Madras. The learned Single Judge dismissed the arbitration petitions filed by the railway administration by its order dated 30th November, 2010. Thereafter the contractors filed applications before the High Court for direction to the railways to make payments of the amount. Thereafter Application Nos. 780 & 781 of 2011 were filed in the O.P. Nos. 142 & 143 of 2007 by the contractors seeking a direction from the Court directing that the amounts awarded by the learned Sole Arbitrator be paid from the amount deposited by the railway administration with the High Court along with the accrued interest as on date on the aforesaid amount. These applications were allowed by order dated 24th February, 2011. The High Court directed that the awarded amount deposited by the railways in the Court for satisfying the outcome of the original petitions which was subsequently converted into fixed deposit receipts, be dispersed to the respondent contractors.

7. Again the railway administration filed intra court appeals challenging the order of the learned Single Judge principally on the ground that the railway administration was not liable to pay any interest for the period subsequent to the deposit of the principal amount into Court. The appeals filed by the railway administration were dismissed by the High Court by the impugned order dated 21st March, 2012. The High Court held that railway administration had not questioned the power of the sole arbitrator to award interest. The issue with regard to the award of interest was also not raised before the learned Single Judge. For the first time before the Division Bench, a plea was raised that the award of interest was contrary to Clause No. 2401 of the Indian Railways Standard Conditions of Contract. The Division Bench of the High Court came to the conclusion that the aforesaid clause has no application at all as it applies only to amounts, which have been withheld or retained under lien. The amounts having already been paid were sought to be illegally recovered from the contractors. The sole arbitrator found that such order of recovery can not be sustained in law and the recoveries affected were illegal. The High Court, however, concluded that Clause No. 2401 would have application only in respect of amounts which had not been paid to the contractors. The railway administration can not exercise lien over the amounts already paid to the contractors. Therefore, award of the arbitrator did not suffer from any error

apparent. It was further held that the learned Single Judge having upheld the award, the appeals deserve to be dismissed.

8. The appeals having been dismissed, the Union of India has approached this Court in these Civil Appeals.

9. We have heard Mr. Mohan Jain, learned Additional Solicitor General, appearing for the appellants.

10. It is submitted that the only question which arises for consideration of this Court is whether the contractors are entitled to interest for the amount withheld and if so at what rate. The contractors had claimed interest @18 per cent from the date of recovery till payment. Mr. Jain submitted that the High Court has wrongly held that the appellant had no authority to exercise lien on the current payments in relation to the amount already released to the contractors. It is submitted by Mr. Jain that the arbitrator had no authority to award interest in view of the prohibition contained under Section 31(7) of the Arbitration Act, 1996. Learned Additional Solicitor General pointed out that the contract entered into between the parties did not provide for any payment of interest. Mr. Jain also pointed out that under Clause 2403, the railway administration has a lien on all the amounts of money that may be due to the contractors, in praesenti or in the futuro. Therefore, when the contractors were paid in excess of the amounts actually due, the appellants were fully justified in recovering the amount from the respondents by exercising the lien over the future bills in terms of Clause No. 2403. He submits that the sole arbitrator was wholly unjustified in awarding interest, as under Clause No. 2403(b), it is specifically provided that the contractors shall have no claim for interest or damages whatsoever, for the amount so retained even in case the arbitration award or any other legal proceeding subsequently holds that the amount was withheld illegally. Mr. Jain submits that the learned Single Judge erred in holding that the award did not suffer from an error apparent on this short ground. In support of the submission, he relies on judgment of this Court in the case of Himachal Pradesh Housing and Urban Development Authority & Anr. Vs. Ranjit Singh Rana.[1]

11. Mr. Jain further submitted that the principal amount awarded was deposited in Court in 2007. This amount was released to the contractors on 24th April, 2011 alongwith the interest, but 30 per cent of the amount was duly withheld. This was in agreement with the respondents. He also pointed out that in fact the recovery of the amount was deferred after discussions with the respondents. In view of the

agreements, the respondents had no justification for claiming any interest and the award granting such relief suffer from an error apparent as it was contrary to the contract. In support of this submission, he relies on judgment of this Court in Sree Kamatchi Amman Construction Vs. Divisional Railway Manager (Works), Palghat & Ors.[2] He also relied on Sayeed Ahmed & Company Vs. State of Uttar Pradesh & Ors.[3] and Union of India Vs. Krafters Engineering and Leasign Private Limited[4].

12. Mr. C.S. Vaidyanathan, learned senior counsel appearing for the respondents, on the other hand, submitted that the payments have been made to the contractors from 1989 till November, 1994. The High Court judgment in the writ petitions challenging the recovery notice were set aside by the High Court. The respondents had agreed to the deduction of 30 per cent only because the contractors required the money for execution of further works. He submitted that the appellants can not possibly be permitted to claim that the respondents had agreed to the deduction of 30 per cent of the amount due. He pointed out that the recovery was made against the supplies made under the agreements of 9th December, 1991 in relation to the contracts which were being performed in the year 1996. In such circumstances, the appellants had no authority to exercise lien on the amounts that accrued due to the works performed subsequent to 9th December, 1991 under Clause(s) 2401 or 2403 of the Contract. Mr. Vaidyanathan emphasized that such recovery of the time barred claims is clearly without any justification. The appellants having failed to notify that 30 per cent of the amount due had been withheld, the invocation of Clause No. 2401 or 2403 would be wholly illegal. Learned senior counsel further submitted that the appellant can not justify the recovery on the basis of the letter dated 22nd October, 1997 as it was written without prejudice to the rights of the contractors. The counter claims made by the appellant were clearly time barred and hence, disallowed by the sole arbitrator. Mr. Vaidyanathan relied on a Constitution Bench decision of this Court in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa & Ors. Vs. N.C. Budharaj (Deceased) by LRs. & Ors.[5] Reliance was also placed upon Secretary, Irrigation Department, Government of Orissa & Ors. Vs. G.C. Roy[6] in support of the submission that a person deprived of his money is entitled to be compensated by way of interest, therefore, any provision in the contract which seeks to take away such a right has to be strictly construed. The ratio in the aforesaid judgment has been subsequently reiterated, according to Mr. Vaidyanathan, in the case of Sree Kamatchi Amman Construction (supra). Mr. Vaidyanathan submitted that the railway administration had no authority either under Clause 2401 or 2403 of the contract to recover the amounts allegedly

overpaid for the work done prior to 1991 from the amounts due to the contractors for the works done subsequently.

13. We have considered the submissions made by the learned counsel for the parties.

14. Clause Nos. 2401 and 2403 are as under:-

> "2401. Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the Contractor, the Purchaser shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the Contractor and for the purpose aforesaid, the Purchaser shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the Contractor, the Purchaser shall be entitled to withhold and have lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time-thereafter may become payable to the Contractor under the same contract or any other contract with the Purchaser or the Government pending finalization or adjudication of any such claim.
>
> It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above, by the Purchaser will be kept withheld or retained as such by the Purchaser till the claim arising out of or under the contract is determined by the Arbitrator (if the contract is governed by the arbitration clause) or by the competent court as prescribed under Clause 2703 hereinafter provided, as the case may be, and that the Contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the contractor."
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> "2403. Lien in respect of Claims in other Contracts:
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> a) Any sum of money due and payable, to the Contractor (including the security deposit, returnable to him) under the contract may withhold or retain by way of lien by the Purchaser or Government against any claim of

the Purchaser or Government in respect of payment of a sum of money arising out of or under any other contract made by the Contractor with the Purchaser or Government.

b) It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Purchaser or Government will be kept withheld or retained as such by the Purchaser or Government till his claim arising out of the same contract or any other contract is either mutually settled or determined by the arbitrator, if the contract is governed by the arbitration clause or by the competent court under Clause 2703 hereinafter provided, as the case may be, and that the Contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the Contractor."

15. Clause 2401 provides that the railways shall be entitled to withhold and also have a lien to retain any amount deposited as security by the contractor to satisfy any claims arising out of or in the contract. In such circumstances, the railways can withhold the amount deposited by the contractors as security and also have lien over the same pending finalization or adjudication of the claim. In case, the security deposit is insufficient to cover the claim of the railways, it is entitled to withhold and have lien to the extent of the amount claimed from any sum payable for any works done by the contractor thereafter under the same contract or any other contract. This withholding of the money and the exercise of the lien is pending finalization or adjudication of any claim. This clause further provided that the amount withheld by the railways over which it is exercising lien will not entitle the contractor to claim any interest or damages for such withholding or retention under lien by the railways.

16. Clause 2403 again provides that any sum of money due and payable to the contractor under the contract may be withheld or retained by way of lien by the railway authorities or the Government in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the railway authority or the Government.

17. Clause 2403(b) further provides that it is an agreed term of the contract that against the sum of money withheld or retained under lien, the contractor shall have no claim for interest or damages whatsoever provided the claim has been duly notified to the contractor.

18. We are of the opinion that the sole arbitrator in awarding interest to the contractors has failed to take into account the provisions contained in the aforesaid two clauses. We find merit in the submission made by learned Additional Solicitor General that award of interest at-least from the date when the amount was deposited in Court was wholly unwarranted. Therefore, the High Court as well as the arbitrator, in our opinion, have committed an error of jurisdiction in this respect. This view of ours will find support from the judgment of this Court in the case of Sayeed Ahmed & Company (supra), wherein it has been held as follows:-

> "16. In view of clause (a) of sub-section (7) of Section 31 of the Act, it is clear that the arbitrator could not have awarded interest up to the date of the award, as the agreement between the parties barred payment of interest. The bar against award of interest would operate not only during the pre-reference period, that is, up to 13-3-1997 but also during the pendente lite period, that is, from 14-3-1997 to 31-7-2001."

19. This view has been reiterated by this Court in Sree Kamatchi Amman Construction (supra), wherein it has been held as follows:-

> "19. Section 37(1) of the new Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to the date of award. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of award."

20. From the aforesaid it becomes apparent that the arbitrator could not have awarded any interest from the date when the recovery was made till the award was made. However, interest would have been payable from the date when the award was made till the money was deposited in the High Court and thereafter converted to fixed deposit receipts. Upon the amount being deposited in the High Court, no further interest could be paid to the respondents.

21. In view of the aforesaid, the appeals are allowed and it is directed that the respondents shall not be entitled to any interest on the amount which was recovered by the appellant, till the date of award and thereafter till the date when the amount awarded was deposited in the High Court, i.e. from 12th July, 1997.

22. The appeals are allowed in the aforesaid terms.

[1] (2012) 4 SCC 505
[2] (2010) 8 SCC 767
[3] (2009) 12 SCC 26
[4] (2011) 7 SCC 279
[5] (2001) 2 SCC 721
[6] (1992) 1 SCC 508