

SUPREME COURT OF INDIA

State of Orissa

Vs.

Samantary Construction Pvt. Ltd. & Anr.

C.A.No.2991 of 2007

(Anil R.Dave and Adarsh Kumar Goel,JJ.,)

11.09.2015

JUDGMENT

Adarsh Kumar Goel,J.,

1. The question raised in this appeal is whether any interference is called for with the award dated 29th June, 2003 on the basis of objections of the appellants-State of Orissa.

2. The Respondent-Company ("the Contractor") was awarded the work of "Construction of Mahanadi Barrage on the Right Side from the Right Divide Wall including Right Head Regulator" vide Agreement dated 11th February, 1986 at approximate cost of Rs.5 crore. The project was to be completed by 11th November, 1987. However, within the said period only 24.99% work was executed. Further extension of time was granted upto 21st March, 1988. Till then, only 36.81% of the work was executed. In these circumstances, vide letter dated 21st April, 1988, the contract was terminated under Clause 46 of the General Conditions of Contract. The work executed till then was only 47.67%.

3. The Contractor made a claim for Rs.6.99 crore towards its dues. The dispute was referred to the Arbitration. Retired Justice B.K. Behera ('the Arbitrator') vide award dated 29th June, 2003 upheld the claim of the Contractor to the extent of Rs.4.45 crore. The Arbitrator also allowed counter claim of the Department to the extent of Rs.1.37 crores.

4. The Contractor had raised 26 items of claim, out of which 21 were rejected and five were accepted. The major item of claim was Item No.18 against which award of Rs.3 crore was made. The said claim was towards hire charges of the machinery and equipment as follows :

"The various machineries which were purchased by the claimants against sanction of advance from the respondents along with the own machineries of the claimants and those brought on hire from the private parties have been seized by the respondents. The respondents are to pay hire charges on each machinery as calculated in Annexure-P for the period those machineries are detained by the respondents. The

hire charges of the machineries calculated till 31-10-1989 amount to Rs.68,44,332.00."

5. The Annexure referred to above, is as follows :

Sl. No.	Description of plants and machineries	Nos.	Period	Rate/each Day Rs.	Amount in Rs.
1	L & T poclain (Excavator)	1	21.4.88 to 31.10.89 = 556 days	7,475.00	44,77,525.00
2	Hand Winch	6	-do-	210	1,17,390.00
3	Derrick for sheetpiling	1	-do-	70	39,130.00
4	Vibrator for concreting	2	-do-	48	26,832.00
5	Concrete Mixer (Jay Pee)	4	-do-	648	3,62,232.00
6	Wee Point Pump with accessories	5	-do-	2405	13,44,395.00
7	Diesel Pump (ship)	6	-do-	517	2,89,003.00
8	Electric Pump Pan (ship)	6	-do-	175	97,825.00
9	Trucks	4	21.4.88 to 4.6.88 = 45 days	500	90,000.00
					68,44,332.00

N.B. This amount has been calculated till the preparation of this claim statement, i.e. up to 31-10-89 and the actual amount shall be arrived at after taking into consideration the period from 1-11-1989 till the date of handing over all the aforesaid plants and machinery by the respondents to the claimants.

6. It is not necessary to refer to the other items of dispute as learned counsel for the parties have raised contentions mainly in respect of Item No.18.

7. The Arbitrator held that the seizure of the machinery and other equipments was illegal as termination of contract itself was illegal. The Contractor was therefore, entitled to hire charges as per Government rates which amounted to Rs.5 crores but since no men were employed to maintain the machines and no oil was used, the fair amount of claim to be upheld was Rs.3 crores.

8. The appellant filed objections under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") to the award including the award of Rs.3 crores against the above Item No.18 in favour of the Contractor.

9. The District Judge held that the Arbitrator committed gross illegality in awarding the amount of Rs.3 crore with interest @ 18% p.a. from the date of award till the date of payment. The termination of the agreement was not justified in absence of lack of diligence on the part of the Contractor. The claim of the Contractor was to the extent of Rs. 68,44,332/- against which award of Rs.3 crore could not be made. The letter of the Engineer-in-Chief to the Government could not be looked into in support of the stand of the Contractor.

10. The District Judge accepted the objection and held that the claimed amount was Rs. 68,44,332/- which was calculated upto 31st October, 1989. There was no tangible material beyond oral submission of the Contractor to substantiate the claim.

11. The High Court reversed the said view. It was observed that the claim was not limited to Rs. 68,44,332/- as erroneously assumed. The claim was for the entire period for which the Contractor was deprived of the machinery and the equipment. Calculation of figure of Rs. 68,44,332/- was till 31st October, 1989. It was further observed that the scope of Section 34 of the Act was limited to patent illegality or total perversity on the face of the record. The Court could not substitute its own decision for the decision of the Arbitrator on merits. Reliance was placed on the decisions of this Court in *M/s. Trading Co. vs. Government of Kerala*¹, *Coimbatore Distt. Podu Thozillar Samgam vs. Balasubramania Foundry*², *State of Rajasthan vs. Puri Construction Co.*³, *Bhagbati Oxygen Ltd. vs. Hindustan Copper Ltd.*⁴, *Hindustan Construction Co. Ltd. vs. State of Jammu and Kashmir*⁵, *Oil Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.*⁶ and *Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan*⁷.

12. As regards the objection of the appellant against the admissibility of letter of the Engineer-in-Chief dated 21st July, 1991, it was observed that authenticity of the said document was not disputed. The said Chief Engineer was in charge of the project and he had given his report after thorough verification of the work done. The Arbitrator was not debarred from looking into the same. The Arbitrator was not bound by the technical rules of evidence and was to follow the principles of natural justice. Section 19(4) of the Act empowered the Tribunal to determine admissibility, relevance, materiality and weight of evidence of a document. The said letter showed that termination of the contract was not justified as the Contractor had not neglected or failed to execute the work with due diligence and had also not violated any of the provisions of the contract. The Contractor had reasonable grounds for the delay and the entire delay was not attributable to the Contractor. The Contractor had completed most difficult part of the work and there was justification for further extension of time.

13. We have heard learned counsel for the parties.

14. Principal contention raised on behalf of the appellant is that the District Judge rightly upheld the objection against the award in respect of Item No.18. The claim based on hire charges could not be for indefinite period and could in no case exceed the price of the machinery and other equipment. Moreover, the contract itself provides for idling charges and

the Contractor could at best claim the said charges for the machinery and the equipment. It was also submitted that termination of the contract itself was justified and the Contractor wrongly relied upon the report of the Chief Engineer which was inadmissible in view of Section 81 of the Act. Reference was made to Explanation to Section 34 to the effect that if the award was in violation of Section 81, the same will be in conflict with the public policy of India which is a ground for setting aside the award under Section 34(2)(b)(ii).

15. Learned counsel for the respondents-Contractor supported the view taken by the High Court. It was pointed out that Section 81 of the Act had no relevance as the said section was in part III dealing with conciliation. The conciliation commenced, under Section 62, by acceptance of a written invitation to conciliate and if the parties thereafter appoint a Conciliator who proceeds as per the procedure laid down under the said Chapter of the Act. No such procedure having been followed, the letter of the Chief Engineer cannot be treated to be covered by Section 81 of the Act. The said letter could not be treated to be irrelevant or inadmissible in evidence. In any case, the decision of the Arbitrator with regard to its admissibility and reliability had to be accepted as final.

16. Having considered the rival submission and perused the record, we are of the view that the appeal deserves to be partly allowed.

17. Undoubtedly, the award of the Arbitrator may not be interfered with on the ground that the same was erroneous or on the ground that a different view could be taken on merits of the controversy. In considering an objection to the award, the Court does not sit in appeal over the decision on merits. However, patent error or perversity could certainly provide basis for interference.

18. In *Saw Pipes Ltd. (supra)*, it was held that the expression 'public policy of India' has to be construed as being consistent with :

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality; or
- (d) if it is patently illegal.

19. In *ONGC vs. Western Geco International Ltd.*⁸, it was observed that the expression 'fundamental policy of Indian law' refers to the principles providing basis for administration of justice and enforcement of law in this country which included judicial approach, i.e. not acting arbitrarily or whimsically and acting in a fair, reasonable and objective manner without taking into account any extraneous consideration, following the principles of natural justice, i.e. taking a decision by due application of mind and by recording reasons and taking rational decision which can be decided on the touchstone of *Wednesbury*⁹.

20. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd.*¹⁰, it was observed that dealing with an objection to an award, a court does not sit in appeal over the award by reassessing or reappreciating the evidence.

21. The above principles are well recognized and have been reiterated recently in *Navodaya Mass Entertainment Ltd. vs. J.M. Combines*¹¹ and *Associate Builders vs. Delhi Development Authority*¹²

22. Coming to the present case, while we do not find any merit in the contention that Section 81 of the Act vitiated the award on account of inadmissibility of the letter of the Chief Engineer, we do find merit in the contention that there is non application of mind in awarding the amount of Rs.3 crores towards the hire charges. Under the 1996 Act, the award is required to be a reasoned one unless the parties agree that no reasons are to be given or the award is based on agreement (Section 31(3)). The Arbitrator ought to have ascertained the total value of the machinery. Any reasonable person dealing with a claim on account of loss caused by the wrongful seizure of machinery or equipment will certainly enquire into the total value thereof. The hire charges may, at times furnish the basis for determining the compensation but such determination cannot normally exceed the price of the equipment as the loss caused cannot normally be more than the price of the equipment itself. In absence of such examination, the award can certainly be held to be perverse or based on non application of mind. In this view of the matter, either the parties have to be left free to have this issue re-determined which may further delay the matter or we may ourselves determine the claim based on the material on record. The latter course has been suggested by learned counsel.

23. Learned counsel for the appellant has pointed out that as per invoice of purchase of the excavator, the price was Rs.27,34,134.75. In respect of the said machinery, claim of the Contractor is Rs.44,77,525/- only upto 31st October, 1989 out of the total claim of Rs.68,44,332/-. The claim could not be upheld beyond the price even if depreciation was not considered. On that basis total claim under Item No.18, on the date of the seizure could not exceed Rs.50 lakhs which appears to be the price of the machinery.

24. Taking an overall view including the interest component upto the date of award (as the interest has been awarded only from the date of award) claim of the Contractor could be assessed at Rs. 1 crore 25 lakhs. We are conscious that we are not to substitute our opinion for that of the Arbitrator but since this part of the Award is outrightly perverse and not based on application of minds, we modify the award in respect of Item No.18 to Rs.1 crore 25 lakhs as on the date of the award instead of Rs.3 crores. Subject to this modification, the award is upheld in all other respects. Final calculation and adjustment may be made accordingly before the Executing Court.

24. The appeal is partly allowed to the above extent.

¹ (1989) 2 SCC 38

² (1987) 3 SCC 723

³ (1994) 6 SCC 485

⁴ (2005) 6 SCC 462

⁵ (1992) 4 SCC 217

⁶ (2003) 5 SCC 705

⁷ (1999) 5 SCC 0651

⁸(2014) 9 SCC 0263

⁹*Associated Provincial Picture Houses Ltd. vs. Wednesbury Corpn.* (1948) 1 KB 223 : (1947) ALL ER 680 (CA)

¹⁰(2012) 1 SCC 0594

¹¹(2015) 5 SCC 0698

¹²(2015) 3 SCC 0049