SUPREME COURT OF INDIA

Sharma & Associates Contractors (P) Ltd.

Vs.

Progressive Constructions Ltd.

C.A.No.1059 of 2017

(A.K.Sikri and R.K.Agrawal,JJ.,)

21.03.2017

JUDGMENT

A.K.Sikri,J.,

SLP(Civil)No.716 of 2012

1. The National Hydro-Electric Power Corporation Ltd. (hereinafter referred to as 'NHPC") had floated tender for award of work of construction of left side Afflux Bund from RD-00 M to RD-1700 M of Tanakpur Hydro-Electric Project, Tanakpur, Distt. Nainital, U.P. sometime in the 1980s, when Nainital was part of State of Uttar Pradesh (now Uttarakhand). In that tender, Hindustan Steel Works Construction Ltd. (HSCL) emerged as the successful tenderor to whom the contract was awarded by NHPC by entering into contract dated January 28, 1986. The contract permitted sub-contracting thereof by HSCL with the consent of NHPC. Thus, HSCL sub-contracted the said works to respondent herein, i.e. Progressive Construction Ltd. (PCL) vide contract dated July 16, 1991. PCL had further sub-contracted the said work or part thereof to the appellant herein, i.e. M/s. Sharma & Associates Contractors (P) Ltd. (SAPL). This appeal relates to disputes between SAPL (the appellant) and PCL (the respondent). Though, work was sub-contracted to the appellant, it is an admitted case between the parties that the sub-contracting of the work was not permissible by the respondent to the appellant. Be that as it may, a contract dated February 09, 1990 was signed between the appellant and the respondent (even prior to the award of work by HSCL to the respondent), though it was sealed on April 15, 1992, i.e., after the respondent was awarded the sub-contract from HSCL on July 16, 1991. From the facts recorded upto now, it is clear that there is a main contract between the employer NHPC and HSCL which is dated January 28, 1996 and HSCL sub-contracted the work to PCL and contract between them is dated July 16, 1991, third contract which is between PCL (the respondent) and SAPL (the appellant) is dated February 09, 1990, sealed on April 15, 1992.

2. Disputes arose between the appellant and the respondent in respect of execution of the work. According to the appellant, certain payments were not made to it by the respondent

though it had executed work. Those, disputes were referred to for adjudication to the arbitration as per arbitration clause in the contract between appellant and respondent by the High Court in petition filed by the appellant under Section 20 of the Arbitration Act, 1940. After adjudication of these disputes, the arbitrator rendered his award dated February 18, 1999. Since this was an award under Arbitration Act, 1940, the same was filed in the Court for making it rule of the court and was registered as Suit No. 492/99. Respondent filed objections thereto which were dismissed by the learned Single Judge vide its judgment dated November 18, 2004. In respect of six claims raised by the appellant, award was passed by the arbitrator allowing Claim Nos. 1 to 3 which was upheld by the learned Single Judge. We are not concerned with all those claims except Claim No. 1 inasmuch as in appeal preferred by the respondent against the aforesaid judgment of the learned Single Judge, Division Bench has allowed the appeal in respect of six claims and set aside the award holding that no money is payable under this claim by the respondent to the appellant. As far as Claim No. 1 is concerned, it was on account of revised rates received by the respondent from HSCL towards deviation in quantities. The appellant contended that since it was a back to back contract, the manner in which the rates are revised upward and received by PCL from HSCL, benefit thereof has to be given to the appellant also. The matter with regard to the revision of rates, which formed part of Claim No. 1, pertains to item nos. 1 and 6 which were to be executed by the appellant. Respondent had taken up this matter with HSCL, purportedly at the instance of the appellant, and HSCL had revised the rates in the following manner:

Item No.	Revised rate at which respondent Received payment	Less profit @4% for respondent	Revised rate payable to petitioner
1	Rs. 33.49/cum	Rs. 1.34/cum	Rs.32.15/cum
6	Rs.249.82/cum	Rs.11.99/cum	Rs.237.83/cum

> "Thus as against original rate of Rs. 13.44/cum for item No. 1, the petitioner was entitled to the revised rate of Rs. 32.15/cum, while for item no. 6 the increase was to be from Rs. 185.28 to Rs. 237.82/cum"

3. This plea of the appellant was accepted by the learned arbitrator who awarded a sum of Rs. 19,38,357/- against Claim No. 1 and the aforesaid approach was accepted by the learned Single Judge.

4. We may state here the basis on which this claim was allowed. Taking into consideration certain correspondence exchanged between the parties as well as between PCL and HSCL. In the sub-contract that was awarded by HSCL to the respondent certain pre-contractual documents were incorporated specifically, in Clause 2 of the said sub-contract. That correspondence indicates that if NHPC was to agree to execution of Item No. 1 at a rate of Rs. 30 Cubic Metre (cum) or more against HSCL's claim of Rs. 40 cubic metre then respondent would be agreeable to execution of job on HSCL's tendered rate subject to retention of the 5% of the proceeds by HSCL. Thus, at the time of entering into the contract between HSCL and the respondent, sum negotiations were going on between HSCL and the employer, i.e., NHPC for revision of the rates and respondent had indicated that once the said

rates are revised benefit thereof shall be given to the respondent. In one of the letters dated February, 1990 issued by PCL to HSCL, which was incorporated in the contract, the aforesaid demand of the respondent was mentioned in the following manner:

> "In the event of M/s. HSCL getting the enhanced rate for earth work excavation item no. 1 due to division in the overall contracted quantity between M/s. HCL and M/s. NHPC, we shall be paid at the enhanced rate for the quantity on earthwork executed by us. As and when the rate for item no. 1 is enhanced at least to Rs. 25 (rupees twenty five) per cum and the amount is received by us, the amounts paid to us towards 10% as per para 7 above, may be adjusted from the additional amount so received by us, provided the enhanced rate for item no. 1 is applied at least for a quantity of 4,00,000 cum."

5. Gone by the aforesaid considerations, the arbitrator had awarded the said claim.

6. Before the Division Bench of the High Court, in the appeal filed by the respondent herein, main contention raised by the respondent was that insofar as contract between the appellant and respondent is concerned, it was an independent contract which had nothing to do with the contract that was signed between the HSCL and the respondent and, therefore, in determining as to whether or not the appellant was entitled to sums claimed, one could look into the terms of the contract signed between the appellant and the respondent and could not travel beyond and rely upon the agreement which was signed between HSCL and the respondent. According to the respondent, the approach of the learned arbitrator, therefore, was totally erroneous as it relied upon the terms of the contract between HSCL and respondent PCL and, thus, committed a grave error bordering on perversity inasmuch as principle of incorporation was not applicable. The Division Bench has accepted the aforesaid argument.

7. It is not in dispute that insofar as contract between NHPC and HSCL is concerned, which is the main contract, it permits sub-contracting of the work by HSCL with the consent of NHPC. It is on that basis sub-contract was signed between HSCL and the respondent. This contract is back to back as Clauses 1.2 and 9 thereof clearly show that terms of main contract to the extent they were 'sensible' stood explicitly incorporated in the contract that was entered into between HSCL and the respondent. However, we are not concerned with the dispute between HSCL and the respondent. As pointed out above, further sub-contract is signed between the respondent and the appellant. Therefore, the moot question is as to whether the principle of incorporation would enter into and extend to this sub-contract as well in the absence of any clause of back to back contract appearing in the contract that was signed between the appellant and the respondent.

8.The High Court in the impugned judgment has answered the aforesaid question in the negative, and rightly so. As noted above, contract executed between HSCL and the respondent was proceeded by correspondent exchange between the said parties. There was a clear understanding between them that in case HSCL is able to get extra payment in respect

of item Nos.1 and 2, HSCL had to pass on the said benefit to the respondent after retaining 5% of the enhanced amount so received. However, there was no such stipulation in the contract entered into between the appellant and the respondent. Entire thrust in the argument of the learned counsel for the appellant before us was that there was back to back contract as according to him the aforesaid stipulations contained in a contract between HSCL and the respondent stood incorporated in the contract entered into between the appellant and the respondent as well. However, we do not find it to be so. Since that was the basis on which the learned arbitrator awarded the claim, the High Court has rightly held that it is a fundamental error committed by the arbitrator. On the other hand, what emerges from the contract between the appellant and the respondent is that the appellant could claim revised rates based only on escalation as per the provisions of Clause 16. Under this head, appellant was entitled to a sum of Rs.7,17,560/-. Following discussion in the impugned judgment is pertinent:

> "12. Another aspect of the matter which perhaps had a bearing and was lost sight by the learned arbitrator, was that along with statement of claim, SAPL had filed a detailed worksheet by way of an annexure justifying the quantification of the amount under claim no. 1. In the said annexure to the statement of claim, SAPL clearly states that PCL was liable to pay the amount on account of revised rates based on "escalation" as per the provisions of clause 16 of the sub contract. It is not disputed before us by the learned counsel for SAPL that towards escalation what is due to the SAPL is a sum of Rs.7,17,560/-. This aspect has also been noted in the arbitrator's award as noticed by us hereinabove. The learned counsel for PCL also did not dispute that PCL was required to pay the said amount to SAPL. Therefore, the entire endeavour of SAPL to seek payment of money under claim no. 1 was premised on the escalation clause (i.e., clause 16) obtaining in the sub contract executed between itself and PCL. The learned arbitrator instead of examining the validity of the claim based on stand taken by SAPL has proceeded to advert to the principles of incorporation of the terms of the main contract in the sub contract. In our view, this was wholly unnecessary. The reason being: that wherever parties intended to incorporate the terms of the main contract obtaining between HSCL and PCL into the sub contract a specific reference was made. One such instance was clause 16. A perusal of clause 16 would show that parties had articulated such an eventuality. For the sake of convenience clause 16 is extracted hereinbelow:
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> "16. Escalation: Escalation shall be calculated and paid as per the formula given in the agreement between principal contractor and M/s Hindustan Steel Works Construction Ltd., on the work done by the work-contractor."

9. It was submitted by Mr. S.B. Upadhyay, learned senior counsel that after going through the various agreements, the arbitrator had formed an opinion and it was not permissible for the High Court to set aside the said award by substituting its own view in place of the view of the arbitrator as the High Court is not a court of appeal. Thus, it was also not permissible for the High Court to reappraise the evidence while examining the objections, i.e., different

contracts in coming to the conclusion that the contract between the appellant and the respondent was not on back to back basis. In support, the learned counsel referred to the following judgments of this Court:

(i) *B.V. Radha Krishna v. Sponge Iron India Ltd*[1]

> "11. The disposal of the matter by the High Court in the manner shown above does not come within the ambit of Section 30 of the Arbitration Act. This Court, time and again, has pointed out the scope and ambit of Section 30 of the Act. In *State of Rajasthan v. Puri Construction Co. Ltd*[2]. after referring to decisions of this Court as well as English cases, the Court observed as follows: (SCC p. 492, para 12)
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> "On the scope and ambit of the power of interference by the court with an award made by an arbitrator in a valid reference to arbitration, various decisions have been made from time to time by Law Courts of India including this Court and also by the Privy Council and the English Courts. Both the parties have referred to such decisions in support of their respective contentions. The factual contentions of the respective parties are proposed to be scrutinised and then the facts are proposed to be tested within the conspectus of judicial decisions governing the issues involved."

This Court again observed in paras 26-28 as follows: (SCC pp. 500-501)

> "The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In *Sudarsan Trading Co. v. Govt. of Kerala*[3] it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. (emphasis supplied) Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator."

(ii) *Ispat Engineering & Foundry Works v. Steel Authority of India Ltd.*[4]

"4. Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. This Court in one of its latest decisions (*Arosan Enterprises Ltd. v. Union of India*[5] upon consideration of decisions in *Champsey Bhara & Co. v. Jivraj Balloo Spg. & Wvg. Co. Ltd*[6]*. Union of India v. Bungo Steel Furniture (P) Ltd*[7]*., N. Chellappan v. Secy., Kerala SEB*[8]*, Sudarsan Trading Co. v. Govt. of Kerala(Supra), State of Rajasthan v. Puri Construction Co. Ltd. (Supra) as also in Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan*[9] has stated that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. This Court in *Arosan Enterprises (Supra)* categorically stated that in the event of there being no reason in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, interference would still be not available unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. This Court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view. The observations of Lord Dunedin in *Champsey Bhara (Supra)* stand accepted and adopted by this Court in *Bungo Steel Furniture (Supra)* to the effect that the court had no jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the arbitrator has committed an error of law. The court as a matter of fact, cannot substitute its own evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties."

(iii) *Indu Engineering & Textiles Ltd. v. Delhi Development Authority*[10]

"5. The scope for interference by the court with an award passed by the arbitrator is limited. Section 30 of the Arbitration Act, 1940 (for short "the Act") provides in somewhat mandatory terms that an award shall not be set aside except on one or more of the grounds enumerated in the provision..."

7. This Court, while dealing with the power of courts to interfere with an award passed by an arbitrator, had consistently laid stress on the position that an arbitrator is a Judge appointed by the parties and as such the award passed by him is not to be lightly interfered with...

8. As noted earlier, the Division Bench in appeal filed under Section 39 of the Act, reversed the order passed by the Single Judge and set aside the award holding that there was no material before the arbitrator for accepting the claim of the appellant. The Division Bench exceeded the limits of its jurisdiction in entering into the facts of

> the case and in interpreting the agreement between the parties and correspondence which was a part of the said agreement. What was the price of the commodity to be paid by the respondent to the appellant was essentially a question of fact. Even assuming that the arbitrator had committed an error in coming to the conclusion that the appellant was entitled to the claim of the escalated price of the commodity (hard coke) under the terms of the agreement and the Division Bench felt that the conclusion should have been otherwise, it was not open to it to interfere with the award on that score..."

10. There is no quarrel about the principle of law mentioned in the aforesaid judgments. However, when it is found that claim was entertained by the learned arbitrator on the basis of provisions in the contract entered into between HSCL and the respondent and said provisions were not made applicable in the contract which was entered into between the appellant and the respondent, the approach of the learned arbitrator is clearly perverse in justifying the claim on the basis of provisions which were not even applicable. Whether contract entered into between the HSCL and the respondent governed the relationship between the appellant and the respondent was a fundamental and jurisdictional issue and such an exercise is permissible by the Court while examining the validity of an award. Undertaking this exercise did not amount to appraising the evidence or dealing with the matter as an appellate court. On the contrary, the approach taken by the Division Bench of the High Court is on the principle that arbitrator is a creature of contract between the parties and if he ignores the specific term of the contract, it would be a question of jurisdictional error which can be corrected by the Court. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part, but it may tantamount to legal malafide as well. It is further settled in law that arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable. This is so held in Food Corporation of India v. Chandu Construction & Anr.4 in the following manner:

> "19. ...Having accepted the terms of the agreement dated 19-9-1984, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material. The claimants' claim had to be adjudicated by the specific terms of their agreement with FCI and no other."

11. To the same effect is the judgment in the case of *Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises & Anr*[11]. .

12. We are conscious of the fact that though the respondent has been able to get the benefit of enhanced rate in respect of Item Nos.1 and 6 and is able to retain the same thereby

depriving the appellant to get this benefit. However, in a matter of contract where the parties have to stick to govern by the provisions of the contract entered into between them, equity has no role to play. Insofar as contract between the appellant and respondent is concerned, appellant was satisfied with "escalation" clause. Respondent, while entering into contract with HSCL ensured that enhancement of rates by the principal employer i.e. NHPC in favour of HSCL will enure to the benefit of the respondent PCL as well. The appellant, however, could not successfully negotiate this aspect with the respondent in the absence of any such clause/arrangement in the contract entered into between the appellant and the respondent. As the contract between appellant and respondent deals only with escalation, appellant has to be satisfied with the same.

13. We, thus, do not find any merit in this appeal, which is accordingly dismissed.

Judgment Referred.

[1]*(1997) 4 SCC 0693*
[2]*(1994) 6 SCC 0485*
[3]*(1989) 2 SCC 0038*
[4]*(2001) 6 SCC 0347*
[5]*(1999) 9 SCC 0449*
[6]*AIR 1923 PC 0066*
[7]*AIR 1967 SC 1032*
[8]*(1975) 1 SCC 0289*
[9]*(1999) 5 SCC 0651*
[10]*(2001) 5 SCC 0691*
[11]*(2007) 4 SCC 0697*