(1988) 02 KL CK 0052

High Court Of Kerala

Case No: M.F.A. 47 of 1981

State of Kerala and Another	APPELLANT
Vs	
P.P. Paulose	RESPONDENT

Date of Decision: Feb. 18, 1988

Acts Referred:

- Arbitration Act, 1940 - Section 16, 30, 39(1)
- Contract Act, 1872 - Section 70

Hon'ble Judges: Sivaraman Nair, J; Shamsuddin, J

Bench: Division Bench

Advocate: Govt. Pleader, for the Appellant; C.K.S. Panickar and K.V.G. Nair, for the Respondent

Judgement

Sivaraman Nair, J.

This is an appeal filed u/s 39(1)(vi) of the Arbitration Act. The State and the Superintending Engineer, Kallada Irrigation Circle, Kottarakkara are the Appellants. The Respondent is a contractor and will be referred to as such in the course of the judgment. He had entered into a contract dated 17th December 1977 with the Appellant regarding the work of right bank main canal from chainage 32,210M. to 33,000M. The work was to be completed as per the agreement within 20 months from the date of handing over of the site to the contractor. The site was handed over on 17th January 1978. The contrac contained periodical targets for the progress of the work. The probable amount of the contract was Rs. 14,87,571. Provision was made for part-payment of the bills. The terms of the contract provided for forfeiture of the earnest money deposit and the retention money in case of breach of contract.

2. Clause 20 of the specifications relating to Kallada Irrigation Project canal works which formed part of the agreement provided that the contractor was bound to take all precautions to protect persons, work and property while blasting rocks for the purpose of formation of the canal. In the selection notice dated 9th November 1977,

issued by the Superintending Engineer to the Contractor accepting his tender, which formed part of the agreement, it was stated that "it must be understood that on no account, the rates once fixed will be increased". The contractor was expected to have inspected the work site and ascertained the hazards, if any, before he tendered for the work. The specifications, which formed part of the contract, provided that within three months of handing over of the site and commencement of the work, the contractor would complete 15 per cent of the total work. He was to complete 35 per cent of the work within six months, 50 per cent within nine months, 70 per cent within 12 months, 85 per cent within 15 months, 97 per cent within 18 months and the complete work within 20 months.

3. The contractor had completed only 1/3rd of the work even after 15 months of commencement of work. In two suits filed in the Munsiff''s Court, Adoor, viz, O.S. No. 83/79 and O.S. No. 95/79, the Munsiff''s Court passed orders of injunction in I.A. Nos. 216/79 and 231/79 on 23rd May 1979 and 30th May 1979 respectively requiring the contractor that he should not blast rock excepting by protective blasting. The contractor alone was the Defendant in the suits and counter Petitioner in the injunction applications. He abandoned the work midway in spite of notices of the 2nd Appellant and his subordinates requiring him to complete the work according to the contract or by rescheduling the work. Instead of doing that, he sent a notice to the Chief Engineer with copy to the 2nd Appellant requiring that he should be paid losses sustained by him on account of stoppage of work at the rate of Rs. 1,500 per day for 25 days. He also claimed payment of final bill incorporating extra rates for protected/controlled blasting done after 1st March 1979 (at Rs. 900 per M3), value of materials left at site and meant for consumption in the work (Rs. 25,000) prevented gains (Rs. 85,000), etc., and return of security and retention amounts. The Chief Engineer naturally rejected the claim of the contractor.

4. The contractor then filed his claim before the named Arbitrator raising 11 claims. We are concerned only with claims 1 to 4, 6 and 9 of the claims. They were, (1) a declaration that the claimant is absolved from all the obligations of the contract and that he is entitled for the payment of his final bill, along with a further amount of Rs. 35,000. (2) Release of security and retention amounts. (3) Extra payment of 35 per cent increase in rates for works carried out since 1st September 1978. (4) Additional payment of Rs. 10,23,800 at the extra rate of Rs. 900/ 10M3 of protected blasting (6) Payment of Rs. 25,000 towards the cost of materials left at site and meant for consumption in the work. (9) A declaration that the arrangement of the balance work shall not be at the risk and cost of the contractor.

5. The arbitrator passed an award allowing claims 1 and 9 absolving the contractor from all obligations of the contract and requiring payment of final bill. Claim No. 2 was allowed directing release of security deposit and retention amount of Rs. 64,764. On claim No. 3 the Arbitrator directed 20 per cent of excess over the agreed rate for all work recorded on or after 1st April 1979. On claims 4 and 6, he directed

the Appellants to pay a total amount of Rs. 88,000.

6. On receipt of notice of filing the award, the Appellants filed their objections under Sections 16 and 30 of the Arbitration Act praying to set aside or remit the award for reconsideration. They stated that the award was vitiated by misconduct and error apparent on the face of the award, that it was improperly procured, that it was not fair and impartial and that it was violative of the terms of agreement. The trial court ejected the objections on the ground that none of the objections could be sustained since the agreement was not incorporated in the award. The Appellants now challenge that order of the trial court for the same reasons.

7. The specific contention which counsel for the Appellant urges before us is that the Arbitrator travelled beyond the terms of the contract in passing the award. He could not have ignored the terms of the contract, nor could he have arrogated jurisdiction which he did not have under the terms of the contract. Article 6 of the agreement, condition 9 of the contract, Clause 20 of the specifications for canal works in the Kallada Irrigation Project, and the letter of acceptance dated 9th November 1977, all of which from part of the contract under which the reference was made to the Arbitrator, had restricted his jurisdiction and the Arbitrator was to follow the limits set for him by the contract in terms of which the reference was made to him. Counsel submits further that it must have been evident to the Arbitrator that there was serious default on the part of the contractor in the performance of the contract and that there was inordintate delay which was entirely, due to him. Counsel further submitted that the Arbitrator misconducted himself in exonerating the contractor of all obligations under the contract which arose from his non-performance or delay in the performance of the contract and consequent breach thereof. Yet another submission is that the effect of the award is to enable the contractor to make capital out of his own delay and default. The Appellants submit that this is also indicative of the misconduct of the Arbitrator and the proceedings. Counsel submits lastly that in any case, it is evident that the award was procured improperly and fraudulently and the same is therefore liable to be set aside.

8. Counsel for the Respondent submits that the Arbitrator has passed a non-speaking award and as such, this Court may not speculate about the reasoning which led to the award and then find fault with the award on such assumed reasons and invalidate the award on the ground of error of law. He submits further that the award is within the scope of the authority of the Arbitrator; and that the contract not having been incorporated in the award, it is not open for this Court to look into the contract to discover errors of law in the award. He submits further that the Arbitrator being a domestic Tribunal chosen by parties, and the Appellants having entered into the bargain with open eyes, cannot repudiate the award in these proceedings.

9. A number of authorities were cited on either side. In Seth Thawardas Pherumal Vs. The Union of India (UOI), the Supreme Court held that:

...if Government expressly stipulated and the contractor expressly agreed, that Government was not to be liable for any loss occasioned by a consequence as remote as this, then that is an express term of the contract and the contractor must be tied down to it. If he chose to contract in absolute terms that was his affair. But having contracted, he cannot go back on his agreement simply because it does not suit him to abide by it.

10. It was also held alternatively that the contractor was not entitled to claim any amount in excess of what was stipulated in the contract. In Alopi Parshad and Sons Ltd. Vs. Union of India (UOI), the Supreme Court held that the award of additional expenses incurred on account of abnormal rise in prices in defiance of the specific term of the contract was, on the face of it, erroneous and such error is good enough ground to set aside the award u/s 30 of the Arbitration Act. The Supreme Court observed that:

The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague pela of equity.

11. In Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others, these propositions were reiterated. The Supreme Court observed that:

...if the parties set limits to action by the arbitrator, then the arbitrator has to follow the limits set for him, and the court can find that he has exceeded his jurisdiction on proof of such action. The assumption of jurisdiction not possessed by the arbitrator renders the award, to the extent to which it is beyond the arbitrator''s jurisdiction, invalid.

12. In Food Corporation of India v. Pratap Transport Co. 1987 KLT 366 my learned brother Dr. Kochu Thommen, J. speaking for the Bench held that:

...The parties having agreed upon those terms are bound by them, and the principle of quantum meruit, as embodied in Section 70 of the Contract Act, has no application whatever. When a proposition of law is stated in the award as its basis, and that proposition is erroneous, the award is liable to be set aside or remitted on the ground of an error apparent on the face of the award. The arbitrator in resorting to the principle in Section 70 of the Contract Act as seen from the award, has not only committed an error apparent on the face of the award, but has acted in excess of his jurisdiction.

13. The proposition that an arbitrator cannot ignore the terms of the contract or travel beyond its terms was specifically stated by the same Bench in State of Kerala v. Raveendranathan 1987 (1) KLT 604. The Bench observed:

...An arbitrator cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot decide outside its bounds. If he did, he exceeded his jurisdiction, and the award would be liable to be set aside. Evidence of

matters not appearing on the face of the award is admissible to decide whether the arbitrator went outside the contract and thus exceeded his jurisdiction. If the arbitrator commits an error in the construction of the contract, that is an error, within, his jurisdiction; but if he wanders outside the contract and deals with matters not allotted to him, he commits an error going to his jurisdiction. The latter can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something arising under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is something outside the award or outside whatever may be said about it in the award where the parties have agreed to submit to arbitration any dispute arising out of the contract, they submit themselves to every dispute, except a dispute whether there was ever a contract at all. If there was no contract, there was no arbitration clause.

14. In State of Kerala v. Paulose 1987 (1) KLT 781 this Court held that:

...In the case on hand, rates are fixed by contract, also stating that nothing over and above the said rates will be payable. Notwithstanding these, unsupported by principle, contrary to law and the contract, the Arbitrator made an award at enhanced rates. He cannot do this when rates are specified in the contract; nor can principles of quantum meruit be invoked in such a situation. When the Arbitrator wanders outside his jurisdiction, he commits an error of jurisdiction, which is fatal. An Arbitrator though free from the duty to make a reasoned award, is not altogether free to depart from law or reason or the covenant, under which he gains jurisdiction. If he does this, it will be clear misconduct u/s 30 of the Act.

15. We do not propose to multiply authority on this point. It is clear to us that the contractor was bound by the terms of the contract, whereunder he was bound to complete the work according to the schedule; and if he failed in that, the Appellants were entilted to forfeit the security deposit and the retention money. The terms of the contract again provided that the contractor would not be entitled to claim any more than the rates specified in the contract. Any delay on his part did not entitle him to claim higher rates. Clause 20 of the specifications for canal work under the Kallada Irrigation Project expressly provided that the contractor was to conduct blasting duly protecting persons, work, property, etc. The order of injunction only directed him to conduct protected blasting. In other words, the order of injunction did not preclude him from carrying on the work in terms of the contract. Breach of the contract naturally resulted in the obligation as per the terms of the contract that the work would be re-arranged and completed at the risk of the contractor as to costs and consequences. The arbitrator proceeded to absolve the contractor of such contractual liability in defiance of the terms of the contract. The contract itself had set limits for his jurisdiction. The arbitrator violated the same and passed an award in excess of his jurisdiction and in defiance of the terms of the contract under which he was appointed as the arbitrator.

16. Counsel for the contractor invited our attention to the decision reported in Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others, . The proposition laid down therein that an award can be set aside only if there is an error of law apparent on the face of the record and not on any mistake of facts, is too well known to require an authority to support it. That decision, however, did not deal with a case where the arbitrator acted beyond his jurisdiction and in violation of the terms of the contract or in total disregard of the same. We are therefore of the opinion that that decision does not apply to the facts of the present case.

17. We are of the opinion that the arbitrator had misconducted himself and the proceedings, that he had exceeded his jurisdiction, that such excess amounted to error of law apparent on the face of the award and that it also amounted to procurement of the award improperly and fraudulently. We are therefore of the opinion that the appeal has to be allowed and the award of the Arbitrator has to be set aside. We do so. The Respondent contractor will be liable to pay costs of the Appellants.