(2010) 08 AP CK 0001

Andhra Pradesh High Court

Case No: Civil Miscellaneous Appeal No. 859 of 1996 and Civil Revision Petition No''s. 2165 and 3729 of 1996

V. Thyagarajan and Bros. Engineers and Contractors	APPELLANT
Vs	
Union of India (UOI) Department of Space Rep. Construction Engineer, Civil Engineering Division Sriharikota and Sri C. Srinivasa Rao Retd Chief Engineers, Sole Arbitrator	RESPONDENT

Date of Decision: Aug. 26, 2010

Acts Referred:

- Arbitration Act, 1940 - Section 30

Hon'ble Judges: P. Swaroop Reddy, J; Ghulam Mohammed, J

Bench: Division Bench

Advocate: M.P. Chandramouli, for the Appellant; Ponnam Ashok Goud, for the Respondent No. 1, for the Respondent

Final Decision: Dismissed

Judgement

Ghulam Mohammed, J.

This appeal is filed against the judgment and decree dated 29-02-1996 in O.S. No. 145 of 1993 on the file of Additional Subordinate Judge, Gudur, Nellore district, where under the award of the Arbitrator relating to Claims Nos. 2, 7 and 14 is set aside while the award relating to Claim Nos. 1, 8, 9 and 13 is confirmed, granting further interest at 18% per annum, thereby dismissing the suit to that extent. CRP No. 3729 of 1996 is filed questioning the judgment and decree in O.S. No. 113 of

1993 while CRP No. 2165 of 1999 is filed against the judgment and decree in O.S. No. 116 of 1993.

2. The brief facts that led to the referring of the dispute to the Arbitrator may be stated thus: On 07-10-1986 the Union of India, Department of Space represented by its Civil Engineering Division, Sriharikota, had entrusted the work of construction of 85 quarters of "C" type Additional Housing Colony at Sullurpet, to the Appellant/Petitioner for a total amount of Rs. 62,79,239/-. As per the Agreement, the work has to be completed within 10 months. The work commenced on 22-10-1986 and it has to be completed by 31-5-1987, as per the Agreement. But, the work could not be completed due to various reasons and the Department has extended the time for completion of work. Some disputes arose between the parties, an Arbitrator was appointed on 06-2-1992 and the matter was referred to him. The Appellant has made 15 claims before the Arbitrator whereas the department has made 6 claims.

3. The Arbitrator passed award on 30-4-1993 in favour of contractor by awarding Rs. 7,17,073/- along with interest @ 18% per annum from 15-6-1988 till the award is made Rule of Court. The Arbitrator disallowed claim No. 3 to 6, 10,11,12,12(A) and 15, made by the Appellant contractor while granting certain amounts in respect of other claims and the Arbitrator has disallowed all the five claims made by the Department of Space, against which O.S. No. 145 of 1993 was filed while the Arbitrator filed O.S. No. 113 of 1993 to make the award rule of court and the contractor filed O.S. No. 116 of 1993 seeking to set aside the Award to the extent of rejecting the claims.

4. The Department filed O.S. No. 145 of 1993 seeking to set aside the award of the Arbitrator insofar it went against the Department, mainly contending that the award is perverse, there is error apparent on the face of the record and the Arbitrator had exceeded his jurisdiction.

5. C.R.P. Nos. 3729 of 1996 and 2165 of 1999 are filed by the Contractor against the judgment and decree dated 29-2-1996 in O.S. Nos. 113 of 1993 and 116 of 1993 to the extent of setting aside of the award of the Arbitrator in regard to Claim Nos. 2, 7 and 14 amounting to Rs. 4,65,266-40; Rs. 65,875/- and the reimbursement of sales-tax levied by the Government of Andhra Pradesh.

6. At the outset, it is to be noted that as far as the claim No. 1 is concerned, the Appellant-Contractor claimed Rs. 1,35,008/- extra for the height variation of the construction, and the Arbitrator has awarded an amount of Rs. 1,21,979-30; in respect of claim No. 2 is concerned, Rs. 4,53,308-40 was awarded towards escalation of amount; claim No. 3 being Avoidable Establishment charges of Rs. 2,27,520/- was disallowed and likewise, Claim Nos. 4 to 6 are disallowed on the ground that the claims are not justified. As far as claim No. 7 is concerned, Rs. 65,875/- was claimed by the Appellant-Contractor towards welding copper, oxidized hinges etc., the Arbitrator has awarded the entire amount. For claim No. 8, Rs. 45,000/- was claimed

by the Appellant towards extra amount for plastering, and the Arbitrator has allowed the entire amount. Further, claim No. 9 was allowed in full amounting to Rs. 18,952/- towards extra-concreting sloped roof. But, claim Nos. 10 to 13 have been disallowed as not justified while interest on the amount was awarded to the extent of Rs. 6,34,609-75 till 30-4-1993 and it was observed that the Department has to reimburse the sales tax if A.P. Government demands with retrospective effect. Aggrieved thereby, the Department and the Contractor filed the suits as stated above.

7. The Court below after going through the facts and the contentions has passed common judgment and decree on 29-2-1996 by clubbing all the suits. The Court below has disallowed the claims No. 2, 7, 9 and 14, which were awarded by the Arbitrator.

8. Heard learned Counsel for the parties and perused the judgment of the court below including award of the Arbitrator.

9. Learned Counsel for the Appellant-Contractor contended that the court below has wrongly exercised jurisdiction of an appellate court while setting aside the award of the Arbitrator in respect of Claim Nos. 2, 7 and 14. He further contended that it is not open to the court below to re-appreciate the facts and evidence and it can interfere only when the grounds stated in Section 30 of the Arbitration Act, 1940 are made out. Learned Counsel further contended that the court below erred in rejecting claim No. 2 (escalation cost) on the ground it is not covered by arbitration clause. In support of his contention, he relied on the decisions in Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, and Central Warehousing Corporation Construction Cell v. P. Devendra Raju 1994 (1) APLJ 368 . Learned Counsel also relied upon the decisions of the Supreme Court in Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, Puri Construction Pvt. Ltd. Vs. Union of India (UOI), and Smt. Santa Sila Devi and Another Vs. Dhirendra Nath Sen and Others, and contended that the award of an arbitrator cannot be interfered with even though the court might have arrived at a different conclusion than the one arrived at by the arbitrator. There is no dispute with regard to the proposition laid down in these judgments.

10. Learned Assistant Solicitor General of India has taken us through the judgment of the Supreme Court in Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another, and contended that granting of compensation on account of delay in completion of work as per terms of contract is not permissible. He also contended that the reasons given for the delay are not at all attributable to the Department and hence the Appellant is not entitled to any relief under claim No. 2, 7, 9 and 14 and the trial Court has rightly set aside the award of the Arbitrator by disallowing the said claims.

11. Having heard the counsel on either side and upon perusing the judgment, it is seen that the claim petition is filed on the ground that there was delay of 9 months and 25 days in completion of work by the Appellant/contractor. In fact, the period of completion of work was extended without invoking penal clauses of the agreement. A perusal of the grounds assigned by the Appellant viz., delay in procuring sand, delaying in getting timber from the Government saw mill from Rajahmundry etc., makes it clear that the contractor was responsible for the delay. The terms of agreement are very clear that the contractor is not entitled for any escalation of any amount and he is not entitled for any extra amounts, in case of delay in completion of work. So, the Award passed by Arbitrator to that extent is bad and the Court below has rightly set aside the same.

12. In order to appreciate the contention that the court below can not interfere with the award of the Arbitrator except in the grounds mentioned in Section 30 of Arbitration Act, 1940, it is pertinent to extract Section 30 of the Arbitration Act, 1940, which reads:

30. Grounds for setting aside award: An award shall not be set aside except on one or more of the following grounds, namely:

a) that an arbitrator or umpire has miscomputed himself or the proceedings;

b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35;

c) that an award has been improperly procured or is otherwise invalid.

13. While dealing with the grounds as enumerated in Section 30 of the Arbitration Act, it would be proper to refer to the award of the Arbitrator. The Arbitrator did not. award the amount stated in Claim Nos. 3 to 6, 10 to 12, 12-A and 15. It is to be seen that the claims have arisen mainly on account of the delay in completion of the work within the stipulated time. In the instant case, the Arbitrator has merely stated that the Department has granted time for extension of time for completing the work, without invoking penal clauses. But, it is seen from the letter dated 26-11-1987 that the Department had extended the period without prejudice to the right of the Government to recover the liquidated damages in accordance with provisions of Clause-2 of the contract. This itself shows that the Arbitrator erred in coming to the conclusion that the Department had accepted the extension without any reservation, which is contrary to the contents of the letter dated 26-11-1987. The agreement does not provide for escalation, but the Arbitrator allowed the said claim on different grounds. Thus, the Arbitrator has not recorded findings based on the terms of contract and evidence. Further, the Arbitrator has awarded Rs. 65,875/- for welding cooper oxidized hinges for doors and cupboard. The court below rejected the claim on the ground that the Contractor had resorted to his own method of work for convenience and it cannot be said to be additional work. Coming to the

Claim No. 9 - concreting the sloped roof, the drawings were given in advance before commencing the work, and as such, the stand of the Contractor that he came to know of the slope later on was not accepted. Thus, the court below had given cogent reasons for interfering with the award of the Arbitrator and narrated as to how the Arbitrator exceeded the jurisdiction. Further, Claim No. 14 was awarded by the Arbitrator by stating that the Department has to reimburse the sales tax if the A.P. State Government demands with retrospectively. In case the rates quoted by the contractor are inclusive of all taxes, the question of reimbursement of sales tax at this stage does not arise. Thus, the court below had given reasons as to how the Arbitrator has misdirected himself in respect of the disallowed claims Nos. 2, 7, 9 and 14.

14. The counsel for the Appellant also relied upon the decisions of the Supreme Court in Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, wherein it was observed that the Arbitrator is not obliged to give reasons for his decision and even if it is obligatory for the Arbitrator to give reasons, it is not obligatory for the Arbitrator to give detailed judgment and further observed as under:

Reasonableness as such of an award unless the award is per se preposterous or absurd is not a matter for the court to consider. Appraisement of evidence by the arbitrator is ordinarily not a matter for the court. It is difficult to give an exact definition of the word ''reasonable''. Reason varies in its conclusions according to the idiosyncrasy of the individual and the times and the circumstances in which he thinks. The word ''reasonable'' has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called upon the act reasonably, knows or ought to know.

Learned Counsel further relied upon another decision of the Supreme court in Smt. Santa Sila Devi and Another Vs. Dhirendra Nath Sen and Others, wherein it was held:

Where an award given by the arbitrator is filed in Court and it is challenged on the ground of its incompleteness, the Court has to bear in mind certain basic positions. These are (1) a Court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal; (2) unless the reference to arbitration specifically so requires the arbitrator is not bound to deal with each claim or matter separately, but can deliver a consolidated award. The legal position is clear that unless so specifically required an award need not formally express the decision of the arbitrator on each matter of difference, (3) unless the contrary appears the court will presume that the award disposes finally of all the matters in difference; and (4) where an award is made de premises (that is, of and concerning all the matters in dispute referred to the arbitrator), the presumption is, that the arbitrator intended to dispose finally of all the matters in difference and his award will be held final, if by any intendment it can be made so.

He has drawn our attention to another decision of the Supreme Court in S. Harcharan Singh Vs. Union of India, wherein it was observed that where the arbitration agreement or deed of submission not requiring arbitrator to give reasons, the award of the Arbitrator cannot be questioned on the ground of error on face of award as it contained no reasons. The Supreme Court in Municipal Corporation Of Delhi v. Jagan Nath Ashok Kumar (1 supra) held as follows:

...there was no evidence of violation of any principle of natural justice. The arbitrator is the sole judge of the quality as well as quantity of evidence and it will not be for the Supreme Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion that the one arrived at by the arbitrator but that by itself is no ground for setting aside the award of an arbitrator.

Another decision of the Supreme Court relied upon by the Appellant''s counsel is Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, wherein it was observed that where it was shown that the award was non-speaking one and Arbitrator has not exceeded his jurisdiction or traveled beyond the contract, in such situation the setting aside of award on the ground of error apparent on face of award is not proper.

15. The decisions relied upon by the learned Counsel for the contractor cannot be made applicable to the case on hand as the facts therein are different and the Arbitrator appeared to have exceeded his jurisdiction. Apart from the above, the counsel for the Appellant also relied upon the decisions of the Supreme Court in Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, wherein it was observed that the Arbitrator is not obliged to give reasons for his decision and even if it is obligatory for the Arbitrator to give reasons, it is not obligatory for the Arbitrator to give detailed judgment and further observed as under:

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reasonably possible, rather than to destroy it by calling it illegal; (2) unless the reference to arbitration specifically so requires the arbitrator is not bound to deal with each claim or matter separately, but can deliver a consolidated award. The legal position is clear that unless so specifically required an award need not formally express the decision of the arbitrator on each matter of difference, (3) unless the contrary appears the court will presume that the award disposes finally of all the matters in difference; and (4) where an award is made de praemissis (that is, of and concerning all the matters in dispute referred to the arbitrator), the presumption is, that the arbitrator intended to dispose finally of all the matters in difference and his award will be held final, if by any intendment it can be made so.

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16. The decisions relied upon by the learned Counsel for the contractor cannot be made applicable to the case on hand as the facts therein are different and the Arbitrator appeared to have exceeded his jurisdiction. Supreme Court in Ramnath International Construction Pvt Ltd v. Union of India (6 supra) observed that the Arbitrator cannot grant compensation on account of delay in completion of work even though specifically barred by the contract clause and the relevant portion reads as under:

(12) We are fortified in this view by several decisions of this Court. We may refer to two of them. In Associated Engineering Co. Vs. Government of Andhra Pradesh and another, this Court was concerned with an appeal, which related to similar claims based on delays in execution. The High Court had held (reported in State of Andhra Pradesh Vs. M/s. Associated Engineering Enterprises, Hyderabad, thus: applying the

principle of the above decision to the facts of the case before us, it must be held that Clause 59 bars a claim for compensation on account of any delays or hindrances caused by the department. In such a case, the contractor is entitled only to extension of the period of contract. Indeed, such an extension was asked for, and granted on more than one occasion. (The penalty levied for completing the work beyond the extended period of contract has been waived in this case). The contract was not avoided by the contractor, but he chose to complete the work within the extended time. In such a case, the claim for compensation is clearly barred by Clause 59 of the APDSS which is admittedly, a term of the agreement between the parties. This Court noticed that the claims were set aside by the High Court on the ground that those claims were not supported by any agreement between the parties, and that the arbitrator had traveled outside the contract in awarding those claims. This Court held that the said claims were not payable under the contract and that the contract does not postulate, in fact prohibits, payment of any escalation under those heads. It affirmed the decision of the High Court setting aside the award of those claims. In Ch. Ramalinga Rddy v. Superintending Engineer while considering the similar claim, this Court observed thus:

claim 8 was for ''payment of extra rates for work done beyond agreement time at schedule of rate prevailing at the time of execution''. The arbitrator awarded the sum of Rs. 39,540. Clause 59 of the A.P. Standard Specifications, which applied to the contract between the parties, stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined. The claim falls outside the defined exceptions. When extensions of time, were granted to the Appellant to complete the work, the Respondents made it clear that no claim for compensation would lie. On both counts, therefore, claim 8 was impermissible and the High Court was right in so holding.

We, therefore, answer the first question in the affirmative.

(13) THE arbitrator in his two speaking Awards recorded the following finding regarding delay:

from the facts and evidence placed before me, I find that the department cannot absolve itself of partial breaches committed which are of fundamental nature and had snow-ball effect. The department alone is not fully responsible, the contractor also has contributed to certain delays. " (in the Hangar Contract). "the documents, the evidence and the arguments clearly indicate that the delay for completing has been a joint responsibility of both the Department and Contractor" (in Road Contract). In spite of having held that both were responsible for the delay and having noticed the arguments based on Clause 11(C) of the General Conditions of contract, the Arbitrator proceeded to award damages on the ground of delay on the reasoning that the contractor is entitled to compensation, unless the employer establishes that the contractor has consented to accept the extension of time alone in satisfaction of his claim for delay. As rightly held by the High Court, which decision

we have affirmed while considering questions No. (i), Clause 11(C) of the General Conditions of Contract is a clear bar to any claim for compensation for delays, in respect of which extensions have been sought and obtained. Clause 11(C) amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of his claims for delay and not claim any compensation. In view of the clear bar against award of damages on account of delay, the arbitrator clearly exceeded his jurisdiction, in awarding damages, ignoring Clause 11(C). In Associated Engineering Co. (supra) this Court held: "the arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has traveled outside the bounds of the contract, he has acted without jurisdiction.

A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside it.

Thus, the Arbitrator in the instant case has exceeded the jurisdiction vested in him, apart from committing error apparent on the face of the record, and the court below rightly interfered with the award of the Arbitrator to the extent of Claims No. 2, 7 and 14 and set aside the claim to that extent.

17. It is not in dispute that the Arbitrator is a creature of the contract. Both the parties agree for appointment of Arbitrator whenever dispute arises in pursuance of the contract. The terms of contract are binding on the parties and they have to claim their rights as per the terms of the contract. The Arbitrator also, while deciding the dispute has to interpret the terms of the contract to come to a correct conclusion. Wherever there is miss-interpretation or wrong interpretation or the Arbitrator travels beyond the terms of contract, it has to be held that the same amounts to error apparent on the face of record and the award shall be set aside. Having regard to the above, we are of the considered view that the court below has rightly exercised the jurisdiction vested in it and we do not see any ground to interfere with the judgment passed by the Court below and the same is accordingly confirmed.

18. In view of the decision rendered in the CMA and for the foregoing reasons, the Civil Revision Petitions being merit less and are liable to be dismissed.

19. In the result, the CMA and the Civil Revision Petitions filed by the Contractor are dismissed. No costs.