

CASE NO.:
Appeal (civil) 3167-3168 of 2005

PETITIONER:
Ramnath International Construction Pvt. Ltd

RESPONDENT:
Union of India

DATE OF JUDGMENT: 11/12/2006

BENCH:
H. K. SEMA & R. V. RAVEENDRAN

JUDGMENT:
J U D G M E N T

H.K.SEMA, J.

The validity and legality of the judgment dated 31.10.2002 of the Division Bench of the High Court of Madras in OSA. No. 27/1995 and 25/1996 is assailed in these appeals.

2. The appellant was awarded two contracts - the first for construction of LRMR Aircraft Hangar and Airtech Hangar and connected works; and the second for construction of roads and allied works at NAS Arakonam. In respect of the two contracts, hereinafter referred to as the Hangar Contract and Road Contract, the tenders submitted by appellant were accepted on 10.10.1988 and 3/5.1.1989 respectively. The necessary agreements were executed between the parties. Disputes arose between the parties in respect of those contracts and the matter was referred to Arbitration. The Arbitrator after examining the oral and documentary evidence made his Awards dated 20.7.1993 and 5.3.1994. Applications were filed before the learned Single Judge by the respondent herein for setting aside the Awards. The learned Single Judge by orders dated 24.8.1994 and 22.9.1995 rejected the applications and in each case made a rule of the court in terms of the award. Being aggrieved the respondent filed OSA Nos. 27/1995 and 25/1996, which were partly allowed by the Division Bench of the High Court. Hence, the present appeals by the claimant contractor.

3. It may not be necessary for us to refer to the entire facts leading to the filing of the present appeals as the substantial question of law posed requires reference to limited facts. Suffice it to say that awards of the learned Arbitrator related to claims under several heads. The controversy in these appeals relate to award in respect of item no. 24 in the Hangar contract and items 13 to 16 in respect of the road contract. The particulars thereof are extracted below :

Item No.	Description of work	Amount claimed	Amount awarded
Hanger Contract			

24
Amount due on account of
escalation in materials and
labour
Rs.2,77,41,692
Rs.51,36,015/98

Road Contract

13
Loss of profit due to turnover
loss for staying beyond
contract period
Rs.2,34,78,404

Rs.41,51,847/50

14.
Additional compensation for
work done beyond original
contract period
Rs.22,89,200

15
Loss of profit on balance
work due to termination of
contract
Rs.26,00,000

16.
Escalation payable for the
period 5.3.1992 to date of
termination
Rs.3,50,000

4. In regard to Hangar Contract, undisputedly, the contract work had to be completed in two phases, the first phase by 31.10.1989 and the second phase by 30.4.1990. However, the contract work could not be completed within the stipulated time, partly due to the default on the part of respondent. It is also undisputed that on the request of the contractor, the employer gave several extensions \026 by a letter dated 28.2.1990 the period of completion of work was extended up to 30.6.1990; by a letter dated 10.5.1991 it was extended up to 31.5.1991; by a letter dated 27.8.1991 it was extended up to 30.9.1991; by a letter dated 23.1.1992 the time was extended up to 15.4.1992; by a letter dated 15.5.1992 it was extended up to 28.5.1992 and by a letter dated 4.6.1992, it was further extended up to 22.6.1992. The contract was subsequently terminated by the employer on 1.7.1992.

5. In respect of the road contract, the date of commencement of work was 3.1.1989. The due date of completion was 2.11.1990 (21 months). The employer granted extensions from time to time on the request of the contractor up to 31.5.1992. Subsequently, the contract was terminated by the employer on 14.7.1992.

6. The basis of the disputed claims is that the execution of work was delayed on account of breaches on the part of the employer and the employer is liable to compensate the contractor for all losses and extra cost on account of such delay and extended execution.

7. These claims were resisted by the employer on the ground that the contractor himself was liable for delays; that the employer had granted extension for the delays; and that the contract prohibits the contractor from making any claim for compensation or otherwise, howsoever, arising as a result of extension of time granted in terms of the contract.

8. The Arbitrator held that where the work was delayed on account of delays attributable to the employer, grant of extension of time by the employer for completing of work does not exonerate the employer from the liability to pay damages for breach on account of the delay caused by the employer unless the employer establishes that the contractor has consented to accept the extension of time alone, in satisfaction of his claims for the delay. The Arbitrator held that in these two contracts, the employer was not released of his liability for damages on account of the delays, by granting extension of time. He, therefore, proceeded to quantify the loss and awarded the amounts as aforesaid. The awards of the Arbitrator on these items were affirmed by the learned Single Judge by making the awards a rule of the court, by judgments dated 24.8.1994 and 22.9.1995.

9. The Division Bench of the High Court after considering the threadbare submissions on the question of law arrived at a conclusion that the Arbitrator has exceeded its jurisdiction in making an award towards claim no. 24 in the Hangar Contract and an award towards claim nos. 13 to 16 in the Road Contract, as they were made in derogation of clause 11(C) of the contract, which prohibited the contractor from making any claim for compensation or otherwise, howsoever, arising, as a result of extension of time granted under the contract.

10. The core questions which arise for our consideration are these :

(a) Whether claim no. 24 of Hangar Contract and claim nos. 13 to 16 of road contract are unsustainable being in derogation of clause 11(C) of the contract, which prohibits any compensation as a result of extension of time granted by the department?

(b) Whether the Arbitrator committed a legal misconduct for not acting in terms of clause 11(C) of the contract though pleaded and submitted before him?

Re : Question (i)

11. Section 11 of the General Conditions of Contract relates to time, delay and extension. We extract below the portions of section 11 relevant for our purpose:

"Section 11 : Time, Delay and Extension

(A) Time is of the essence of the contract and is specified in the contract documents or in each individual works order.

As soon as possible after contract is let or any substantial work order is placed and before work under it is begun, the G.E. and the contractor shall agree upon the time and progress chart. The chart shall be prepared in direct relation to the time stated in the contract documents or the works order for completion of the individual items thereof and/or the contract or works order as a whole. It shall include the forecast of the dates for commencement and completion of the various trades processes or sections of the work, and shall be amended as may be required by agreement between the G.E. and the contractor within the limitation of time imposed in the contract documents or works order. If the work be delayed :

- (i) by force majeure, or
- (ii) by reason of abnormally bad weather, or
- (iii) by reason of serious loss or damage by fire, or
- (iv) by reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the trades employed on the work, or
- (v) by reason of delay on part of nominated subcontractors, or nominated suppliers which the contractor has, in the opinion of G.E., taken all practicable steps to avoid, or reduce, or
- (vi) by reason of delay on the part of contractors or tradesmen engaged by government in executing work not forming part of the contract, or
- (viii) by reason of any other cause, which in the absolute discretion of the accepting officer is beyond the contractors control;

then in any such case the officer herein after mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of works for which separate periods of completion are mentioned in the contract documents or works order, as applicable.

x x x x x

(B) If the works be delayed :

- (a) by reason of non-availability of government stores in schedule B or
- (b) by reason of non-availability or breakdown of government tools and plant listed in schedule C;

then, in any such event, notwithstanding the provisions hereinbefore contained, the accepting officer may in his discretion, grant such extension of time as may appear reasonable to him and the same shall be communicated to the contractor by the G.E. in writing. The decision so communicated shall be final and binding and the contractor shall be bound to complete the works within such extended time.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under condition (A) and (B) above shall be admitted."

Clause (C) provides that where extensions have been granted by reason of the delays enumerated in Clause (A) which were beyond the control of the contractor, or on account of the delays on the part of the employer specified in Clause (B), the contractor is not entitled to make any claim either for compensation or otherwise, arising in whatsoever manner, as a result of such extensions. After enumerating certain delays, sub-clause (viii) of Clause (A) specifically mentions delay on account of any other cause beyond the control of the contractor. The causes for delays specified in clause A, thus, encompass all delays over which the contractor has no control. This will necessarily include any delays attributable to the employer or any delay for which both the employer and the contractor are responsible. The contract thus provides that if there is any delay, attributable either to the contractor or the employer or to both, and the contractor seeks and obtains extension of time for execution on that account, he will not be entitled to claim compensation of any nature, on the ground of such delay, in addition to the extension of time obtained by him. Therefore, the claims for compensation as a consequence of delays, that is claim 24 of Hangar Contract and claims 13 to 16 of Road Contract are barred by clause 11(C).

12. We are fortified in this view by several decision of this Court. We may refer to two of them. In *Associated Engineering Co. vs. Government of Andhra Pradesh* [1991 (4) SCC 93], this Court was concerned with an appeal which related to similar claims based on delays in execution. The High Court had held (reported in AIR 1990 AP 294) 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 travelled 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 Reddy vs. Superintending Engineer [1999 (9) SCC 610], 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.

Re : Question (ii) :

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).

Inspite 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 travelled outside the bounds of the contract, he has acted without jurisdiction\005\005\005..."

X X X X

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 its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside\005\005 In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of the provisions of the contract to the contrary."

In Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises & Anr. [1999 (9) SCC 283], this Court held thus :

"The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or

dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may be tantamount to mala fide action\005\005\005\005\005.It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which would be corrected by the court and for that limited purpose the agreement is required to be considered\005\005\005. He cannot award an amount which is ruled out or prohibited by the terms of the agreement."

14. In the view that we have taken the Arbitrator clearly misconducted himself in awarding compensation under claim no. 24 under Hangar Contract and claim nos. 13 to 16 under the Road Contract which was rightly set aside by the High Court in the order impugned herein, on the ground that the Arbitrator had acted in excess of his jurisdiction.

15. There is no infirmity in the impugned order of the High Court. These appeals being devoid of merits are, accordingly, dismissed. Parties are asked to bear their own costs.