Non -Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1256 OF 2005

O.P. Pathrose … Appellant

Versus

State of Kerala & Anr. … Respondents

J U D G M E N T

K.S. Radhakrishnan, J.

1. This appeal arises out of the judgment of the Kerala High Court in M.F.A. No.45/1996 whereby the High Court has interfered with an arbitration award dated 2.4.1993 and set aside few claims allowed by the Arbitrator.

2. An agreement dated 14.9.1988 was entered into between the Appellant-contractor and the Superintending Engineer, KIP LP Circle, Kottarakkara, for execution of the work for the formation of Kottayam Branch Canal including siphons and cross drainage works. Later, a

supplementary agreement No.1 was executed between the parties on 16.6.1989 extending the time for completion of work by six months from 7.4.1989 to 6.10.1989. The appellant vide letter dated 25.9.1989 sought further extension of time for completion of work without prejudice to his rights and claims. On 29.11.1989, supplemental agreement No.2 for extension of time was executed between the parties whereby the period of completion of work was extended from 6.10.1989 to 31.3.1990. Supplemental agreement No.3 was also signed between the parties on 29.11.1989 for carrying out the extra work. During the pendency of the extended period of contract, the appellant addressed a letter to Respondent No.2 enumerating the various extra payments due and payable to him and further stated that execution of work by the appellant within the extended time would be without prejudice and subject to his rights for all claims and compensation for all losses and damages sustained. It was stated that the work was completed on 31.3.1990 within the extended period in terms of the supplemental agreement No.2. On 5.7.1990, the appellant addressed a letter to Respondent No.2 informing him that the supplemental agreements as aforesaid were executed by him under pressure and coercion. Supplemental

agreement No.4 was signed between the parties on 9.7.1990 for carrying out the extra work, which according to the appellant was beyond the terms of the original agreement. On 18.7.1990, the appellant had sent a letter to Respondent No.2 stating that he had signed the final bill under coercion, duress and undue influence.

3. Disputes and differences arose between the parties and the claim raised by the appellant was referred to the Arbitrator who was the Superintending Engineer of the Department. Before the Arbitrator, the appellant raised claims Nos. a to l. The Arbitrator passed a reasoned award on 2.4.1993 whereby the claims Nos. a, b, c, d, g were allowed. Award was made rule of the Court by the Subordinate Judge's Court, Thiruvananthapuram on 26.10.1993 and the application preferred by the respondents for setting aside the award under Section 30 of the Arbitration Act, 1940 was rejected.

4. The Respondents took up the matter in appeal before the High Court by filing M.F.A. No.45/1996. A Division Bench of the High Court set aside the claims Nos. 'a' to 'd' and decree was passed only in terms of claim 'g'. Aggrieved by the judgment of the High Court, this appeal was preferred by the appellant.

5. Mr. L.Nageswara Rao, learned senior counsel appearing for the appellant submitted that the High Court has committed a grave error in interfering with the reasoned award passed by the Arbitrator and setting aside the claims a to d. Learned senior counsel submitted that the Arbitrator has given cogent reasons for allowing the claims in respect of losses and damages suffered due to breach of contract by the respondents. Learned senior counsel submitted, in any view, the unreasonableness of an Award is not a matter for the court to consider unless the award is per se preposterous or absurd. Learned senior counsel referred to the judgments of this Court in ***Indian Oil Corporation Ltd.*** v. ***Indian Carbon Ltd.***, (1988) 3 SCC 36, ***Arosan Enterprises Ltd.*** v. ***Union of India & Anr.*** (1999) 9 SCC 449, ***Md. Salamatullah & Ors.*** V. ***Government of Andhra Pradesh***, (1977) 3 SCC 590.

6. Learned senior counsel further submitted that with regard to claim No.(b), the Arbitrator derives his jurisdiction in terms of clause 52 of the principal agreement and not in terms of any clause contained in any of the supplemental agreements. Learned senior counsel submitted that the arbitrator has clearly found that the supplemental agreements were executed on account of coercion and

duress and on account of threats meted out by the respondents failing which the final bill would not have been cleared. Learned senior counsel submitted that the High Court should not have interfered with the clear findings recorded by the Arbitrator on that claim. Learned counsel made reference to the judgments of this Court in ***Pure Helium India (P) Ltd.*** v. ***Oil & Natural Gas Commission***, (2003) 8 SCC 593, ***T.P. George*** v. ***State of Kerala & Anr.*** (2001) 2 SCC 758, ***K.N. Sathyapalan*** v. ***State of Kerala & Anr***., (2007) 13 SCC 43, ***Ram Nath International Construction Pvt. Ltd***. v. ***State of U.P***. (1997) 11 SCC 645. Learned senior counsel further submitted with regard to claims nos. c and d that the appellant had to incur heavy expenses for transportation of extra cut spoils and to remove metamorphic rocks and Arbitrator has rightly allowed those claims. In support of his contention reference was made to the judgment of this Court in ***K.N. Sathyapalan*** v. ***State of Kerala & Anr***., (2007) 13 SCC 43.

7. Mr. Chander Uday Singh, learned senior counsel appearing for the Respondents has submitted that the High Court was justified in interfering with the award in respect of claims a to d and cogent reasons have been given by the High Court in interfering with the

award of the Arbitrator. Learned senior counsel submitted that the supplemental agreements were executed by the appellant with open eyes and there was no coercion and duress on the part of the respondents in executing those supplemental agreements. Learned senior counsel further submitted that the work could not be completed by the appellant not due to the fault of the Department, in either handing over of the site or in discharging any obligation on its part. Learned senior counsel also submitted that there was no provision in the contract for paying any amount for transportation of extra cut spoils and for the removal of metamorphic rocks and the High Court was justified in rejecting those claims.

8. We have heard learned counsels for the parties at length. Dispute arose under the Arbitration Act, 1940. The Arbitrator was none other than the Superintending Engineer of the Department. The Arbitrator had entered on reference on 20.3.1991. The claimants submitted their claims on 04.06.1991 and the respondents submitted their pleading in defence on 13.01.1992. The claimant filed 28 documents and the Respondent filed 8 documents which were also taken on file. The Arbitrator inspected the site on 12.6.1992 in the presence of both the parties. The claimant raised 13 claims viz. a to

m and the Arbitrator has allowed only claims nos. 1 to d, g and h and a total amount of Rs.46,14,079/- was awarded in full and final settlement of the claims with 16.5% interest per annum from 20.2.1991 till the date of the payment or decree whichever is earlier. While making the award rule of the Court, the Court directed the Respondents to pay the claimant Rs.46,14,079/- with interest thereon at the rate of 16.5% p.a. from 20.2.1991 to 26.2.1993 and 12.% from 5.4.1993 to the date of the order and 9% thereafter till payment.

9. We are of the considered view that with regard to claims Nos. a and b, the Arbitrator has stated cogent reasons for allowing those claims. After perusing the measurement book and inspecting the site with regard to claim No. a, the Arbitrator has stated as follows:

> "It is seen admitted in the defence pleadings that the hindrances at site were auctioned and cleared only by 25.4.89, which is after the expiry of original time of completion contemplated under the agreement. The original time of completion expired on 6.4.89. The respondents admitted the change in the nature of work. As per the agreement earthen canal was to be formed from ch: 11759m. to 11992m. The earthen canal from ch: 11759m. to 11799m. has been changed to concrete canal. Earthen canal from ch:11928m. to 11998m. was changed into covered flume. Flume canal from ch: 11998m. to 12070m. was converted into siphon. Open flume has been constructed from ch:12406m. to 12524m.

> Earthen canal from ch:12630m. to 12760m. have been converted into concrete canal. Similarly earthen canal from ch: 13080m. to 13100m. has been converted into covered flume. It is observed that there was substantial changes in the design of canal as well as the structure constructed. The respondents admitted in their pleadings that the said changes effected in order to suit the site condition. The respondents ought to have considered this factor while preparing the estimates. The non preparation of estimates based on the site condition is a mistake committed due to defective investigation. The conversion of bridges into covered flume is also seen admitted by the respondents. The sides of the covering flume were protected by R.R. Masonry to retain the earth in the roadway. Earth work filling was made on either sides of the covered flume to get a smooth gradient according to the defence pleadings. The respondents stated in the defence statement that initial requirement of cement has been increased due to additional work sanctioned. There was shortage of cement during April and July 1989. It is revealed from the pleadings of respondents that due to acute scarcity of cement in the stores arrangements were made by the department for local purchase. Apparently all the said factors based on the admissions of the respondents are breach of contract."

10. The Arbitrator on facts found that there were substantial changes in the designs of the canal as well as the structure which, it was found, was effected to suit the site condition. The above facts, it is seen have been admitted by the respondents in their pleadings and in the absence of any contra evidence, the Arbitrator in our view has rightly allowed that claim.

11. We find with regard to claim No.b, the Arbitrator has clearly recorded findings which reads as follows:

> "The claimant in his application for extension of time dated 25.9.89 (Exhibit C-17) requested extension of time without prejudice to his rights and claims whatsoever. Such stipulation in the application has been objected to by the Executive Engineer vide Exhibit C-16 mentioned above. C-27 is a letter from the claimant to the second Respondent stating that he has been put to huge financial losses due to breach of contract by the Respondents. It is to be perceived that the claimant recorded his protest over the execution of agreement. C-16 shows the compulsion exerted on the claimant by the Respondents. During the course of arguments it was admitted by the Respondent that unless the supplemental agreement is executed payment will not be made, and no materials will be issued. Further, it is pointed out that the refusal to execute supplemental agreement would be considered as a default and the Respondent could terminate the agreement under clause 45 of LCB condition. Further I have verified the measurement book. It is seen that from the substantial work has been done which are seen recorded in the Measurement Book before the execution of supplemental agreement. Evidently there was considerable investment by the claimant under the above circumstances the claimant was compelled to execute the supplemental agreement for extension of time."

12. The findings recorded by the Arbitrator have not been controverted by the respondents by adducing any evidence. Finding was recorded by the Arbitrator after site inspection and perusing the measurement book.

13. We are of the view that the High Court has not stated any cogent reasons for upsetting those findings recorded by the Arbitrator. The unreasonableness of an Award is not a matter for the court to consider unless the award is per se preposterous or absurd. Primarily, it is for the Arbitrator to appraise the evidence adduced by the parties. Arbitrator has gone through the defence statement at length and the claims nos. a and b practically remain unopposed so recorded by the Arbitrator in the award itself. The Arbitrator has clearly stated in the award that the respondents had admitted in their pleadings that the changes were effected in order to suit the site conditions. Further, with regard to claim no. b it has been clearly stated by the Arbitrator in the award that, during the course of the arguments, it was submitted by the respondents that unless the supplemental agreement is executed, payments would not be effected and no materials would be released. Further, it was pointed out that refusal to execute supplemental agreement would be considered as a default and the respondents would terminate the agreement under clause 45 of LCB condition. Those factual disputes have not been controverted by adducing any evidence. That being

the factual position, we find no reason to interfere with the award of the Arbitrator in respect of claims (a) and (b). In the absence of any specific terms of reference, we are of the view that the Arbitrator has committed an error in granting claims Nos. (c) and (d) and the High Court has rightly set aside those claims especially when there are no materials to support those claims.

14. Under the above-mentioned reasons the appeal is partly allowed and the judgment of the High Court in respect of claims (a) and (b) is set aside and in respect of claims Nos. (c) and (d) is sustained. Resultantly the award and the decree passed by the subordinate-court in respect of claims (a),(b) and (g) are sustained with interest modified at the rate of 9% from 20.02.1991 till the date of payment and in all other respects the award and the decree passed by the subordinate Court stands set aside. Parties will bear respective costs through out.

…….J.
[Markandey Katju]

…….J.
[K.S. Radhakrishnan]

New Delhi;
March 16, 2010.