

PETITIONER:
P.M. PAUL

Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT 16/01/1989

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
RANGNATHAN, S.

CITATION:
1989 AIR 1034 1989 SCR (1) 115
1989 SCC Supl. (1) 368 JT 1989 (1) 299
1989 SCALE (1) 221

ACT:
Arbitration Act 1940: Sections 14, 17, 30 and 33--Award-Setting aside of--Whether arbitrator has misconducted himself or proceedings--Adjudicating upon matter not subject matter of adjudication--Legal misconduct.

HEADNOTE:

The appellant, a contractor entered into a contract with the respondent for the construction of a building. The contract consisted of two phases. The date of commencement of both the phases was March 10, 1979, the date of completion of Phase I was June 9, 1980 and that of Phase II was November 9, 1980. Dispute arose about the handing over of the site. The appellant's case was that the site was not handed over as stipulated and consequently the work could not either be commenced or completed as stipulated. The respondent asserted that the appellant had abandoned the work and committed a breach of contract. This was negated by the appellant.

As the contract provided for settlement of disputes by an arbitrator, the appellant filed a suit for the appointment of an arbitrator.

The matter came up in appeal to this Court, and one of its former Judges was appointed as an arbitrator. The Arbitrator entered upon the reference, examined the documents, heard the parties, considered the evidence, and made an award after inspecting the sites.

The respondent aggrieved by the award filed a petition and contested the same. It was contended that the arbitrator had travelled beyond his jurisdiction in awarding a sum of Rs.2 lakhs as escalation cost and charges in respect of claim I.

Disposing of the Civil Miscellaneous Petition the Court,

HELD: 1. It is well-settled that an award can only be set aside under section 30 of the Arbitration Act, if the Arbitrator has misconducted himself or the proceeding.

[121C-D]

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2. Adjudicating upon a matter which is not the subject-matter of adjudication, is a legal misconduct for the Arbitrator. [121D]

3. Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. [121F]

In the instant case, the dispute that was referred to the arbitrator was, as to who was responsible for the delay, what are the repercussions of the delay in completion of the building, and how to apportion the consequences of the responsibility. After discussing the evidence and the submission of the parties to the contract, the arbitrator, found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under claim I, he accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator, and the arbitrator had not misconducted himself in awarding the amount as he has done. [121D-E, G-H; 122A]

4. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the respondent, the respondent was liable for the consequences of the delay, namely, increase in prices. [122C-D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION:: Civil Miscellaneous Petition No. 265 19 of 1988.

IN

Civil Appeal No. 2632 of 1987.

From the Judgment and Order dated 10.6.1985 of the Kerala High Court in W.P. No. 210 of 1985 in O.P. No. 897 of 1984.

Mrs. Baby Krishnan for the Appellant.

A.K. Srivastava and C.V.S. Rao for the Respondent.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. This is an application for making the award dated 17th February, 1988 passed by Mr V. Khalid, a former Judge of this Court, in a dispute referred to him by this Court's order dated 6th October, 1987, final and to give consequential directions thereupon.

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On 7th April, 1979 there was a contract for construction of the building in question. The contract consisted of two phases. The date of commencement of both the phases was 10th March, 1979: the date of completion of phase-I was 9th June, 1980 and for phase-II 9th November, 1980. The dispute arose about the handing over of the site. According to the appellant, the site was not handed over to him as agreed upon and therefore, the work could not either be commenced or completed as stipulated. He, therefore, accused the respondent of obstructionist tactics also. According to the respondent, however, the claims put forward by the appellant were imaginary excuses to gain time and that he put forward various demands for extension of time and for payment of compensation to which he was not entitled.

Clause 70 of the general conditions of the contract provided for settlement of disputes by arbitration. The appellant resorted to this clause and addressed a letter dated 13th September, 1980 to the Chief Engineer, South West Zone, Cochin, informing him that if the said disputes were not settled to his satisfaction within 15 days from the date of receipt of the notice, he would be taking appropriate steps to refer the disputes to arbitration in accordance with the said clause. This request of the appellant was turned down by the Chief Engineer, as according to him, work

was in progress and the question of granting reasonable extension of time was under examination. Dissatisfied with this, the appellant took the matter to the Engineer-in-Chief by his letter dated 14th October, 1980 calling upon him to appoint an Engineer Officer as the sole arbitrator to adjudicate upon the disputes between the parties. This request was not acceded to. The relationship between the parties became strained.

The respondent asserted that the appellant had abandoned the work and committed breach of contract. Thereafter, the appellant vide a notice dated 4th October, 1982 called upon the Engineer-in-Chief to appoint an Engineer Officer as the sole arbitrator. After further correspondence, the Engineer-in-Chief by his letter dated 9.6.1983 appointed one Mr. K.C.S. Rao, Chief Engineer, Poona Zone, as the arbitrator in respect of the disputes. Mr Rao, it is asserted, entered into reference. The appellant asserted that Mr Rao was incompetent to function as arbitrator for it was he who had terminated the contract when he was officiating as the Chief Engineer of Sought West Zone.

Aggrieved by this appointment, he filed a suit in the Court of Subordinate Judge, Cochin, seeking leave to revoke the authority of the appointed arbitrator under section 5 of the Arbitration Act.

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(hereinafter referred to as 'the Act'), and for appointment of another person as arbitrator under section 12 of the Act. It is not necessary to set out the various stages of litigation thereafter. Ultimately, the matter came to this Court and by an order passed by this Court on 25th August, 1987 in Civil Appeal No. 2632/87, it was observed as follows :-

"Having regard to the facts and circumstances of the case, we are of the opinion that all the disputes mentioned in the Paper Book be arbitrated by a former retired Judge of this Court. We accordingly appoint Mr. Justice v. Khalid (Retd.) a former Judge of this Court, as the Arbitrator. The Arbitrator will decide his remuneration as he thinks fit and the parties will pay the same in equal shares. The parties will also bear the costs and charges of holding the proceedings including the remuneration and other assistance of Stenographers etc. Council for both the parties have no objection to the aforesaid order. The learned Arbitrator will enter into reference within a fortnight from the receipt of the copy of the order and will make the award within four months thereafter. Costs of the parties in the Arbitration proceedings will abide by the decision of the Arbitrator".

The arbitrator entered upon the reference, examined the documents, heard the parties and considered the evidence. He made his award after inspecting the sites on 20th December, 1987 and 21st January, 1988. The claims of the appellants contractor were as follows:

"1. On account of losses caused due to increase in prices of materials and cost of labour and transport during the extended period of contract from 9.6.80 work for under phase I and from 9.11.80 for work under phase-II.

5,47,612.15

2. On Account of work done under the contract including fully executed and partly executed items at the originally agreed rates and for the cost of materials lying at

site and taken over by the Department as well as for the value of machinery, tools and plants lying over the site and taken over by Department.

7,27,095.01

3. On account of losses caused due to added and infructuous expenditure on overheads, establishments, and

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supervision during the extended period of contract upto 3.12.81, the date of termination.

1,28,864.00

4. On account of losses caused by way of gains prevented due to unlawful repudiation of the contract by the Department and the consequent termination of the contract by the contractor.

1,04,424.58

5. (a) Release of Bank Guarantee for Rs. 1,25,000 (Bank Guarantee No. G/19/80 dated 28.4.80 issued by the State Bank of India, Willingdon Island, Conchin-3).

(b) Refund of the retention amounts recovered by the Department from the Running Account Bills.

Amount not indicated

6. Interest on all the amounts due and payable. @18% PA from 9.12.81 till actual date of payment or realisation".

The claims on behalf of the respondent, were as under:

"1. Excess cost which had to be borne by the Department 19,16,198.82 on account of the defaults of the contractor and subsequent cancellation of the contract after adjusting other amounts due from the contractor under this contract.

2. Cost of reference to Arbitration 7,000.00"

The arbitrator by his award asked the respondent to pay the following:

"(a) On claim No. I, a sum of Rs.2,00,216.18 with interest at 10% from 9.12.1981 till the date of this Award.

(b) On claim No. 11, a sum of Rs.2,47,269.69 with interest at 10% from 9.12.1981 till the date of this Award.

(c) Claim No. III--Disallowed.

(d) Claim No. IV--Disallowed.

(e) On claim No. V(a), the respondent is directed to

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refund the Bank Guarantee sum of Rs. 1,25,000 to the Claimant with interest at 10% from the date of the encashment till the date of this Award.

II. The remuneration of the Arbitrator is Rs.75,000. Rs.50,000 has already been deposited. The claimant and the Respondent are directed to. remit the balance equally (Rs. 12,5000 each) to the Arbitrator to his Madras address by Account payee Draft within two weeks of receipt of the notice under Section 14 of the Arbitration Act, 1940.

11I. The respondent is directed to pay to the Claimant by way of cost Rs. 17,500 towards Arbitrator's remuneration and Rs. 10,000 towards Advocates' fees and cost.

IV. The respondent is directed to suffer their cost.

V. The counter claims preferred by the Respondent against the Claimant are disallowed."

A petition was filed on behalf of the respondent, where-

in it was stated as follows:

"Regarding petitioner's claim No. 1, in the absence of any escalation clause, it is not permissible to the Arbitrator to grant any escalation price as sought by the petitioner. On the other hand, if the work is not completed within the specified time, he has got right to ask for extension of time. Failure to grant extension of time, the contractor can claim difference of prices. That is not the case here. Extension of time was granted and the Arbitrator after considering the contentions put-forth before him has granted 20% of the escalation price which is not in accordance with the terms of the contract. Though the term of the contract envisages that the entire site should be handed over in-time for completion of the work entrusted to him as referred to above in civil works before starting of the work, the contractor is required to put up some preliminary work like construction of temporary store sheds, temporary office which requires sometime and within that time if the other area or the site is not handed over the contractor has got grievances to complain against the Department. Further, by not handing over the site how much damage or loss is sustained has not been

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apprised off. Therefore, it is submitted that Claim No. 1 of the Contractor should have been considered as outside the scope of the contract and hence the arbitrator has exceeded his jurisdiction."

Mr Ashok Srivastava, counsel appearing for the Union of India, submitted before us that this is a reasoned award and the learned arbitrator had granted a sum of Rs.2 lakhs as escalation charges and costs. Mr Srivastava tried to urge that the right to get escalation charges and costs in the absence of escalation clause was not a matter referred to the arbitrator. In other words, it was urged that the arbitrator had travelled beyond his jurisdiction in awarding the escalation cost and charges. It is difficult to accept this objection for reason more than one.

It is well-settled that an award can only be set aside under section 30 of the Act, which enjoins that an award of an arbitrator/umpire can be set aside, inter alia, if he has misconducted himself or the proceeding. Adjudicating upon a matter which is not the subject-matter of adjudication, is a legal misconduct for the arbitrator. The dispute that was referred to the arbitrator was, as to who is responsible for the delay, what are the repercussions of the delay in completion of the building and how to apportion the consequences of the responsibility. In the objections filed on behalf of the respondent, it has been stated that if the work was not completed within the stipulated time the party has got a right for extension of time. On failure to grant extension of time, it has been asserted, the contractor can claim difference in prices.

In the instant case, it is asserted that the extension of time was granted and the arbitrator has granted 20% of the escalation cost. Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award. The

arbitrator has noted that Claim I related to the losses caused due to increase in prices of materials and cost of labour and transport during the extended period of contract from 9.5. 1980 for the work under phase I, and from 9.11.80 for the work under phase II. The total amount shown was Rs.5,47,618.50. After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under Claim I, he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not mis-

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conducted himself in awarding the amount as he has done.

It was submitted that if the contract work was not completed within the stipulated time which it appears, was not done then the contractor has got a right to ask for extension of time, and he could claim difference in price. This is precisely what he has done and has obtained a portion of the claim in the award. It was submitted on behalf of the Union of India that failure to complete the contract was not the case. Hence, there was no substance in the objections raised. Furthermore, in the objections raised, it must be within the time provided for the application under section 30 i.e., 30 days during which the objection was not specifically taken, we are of the opinion that there is no substance in this objection sought to be raised in opposition to the award. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the respondent, the respondent was liable for the consequences of the delay, namely, increase in prices. Therefore, the arbitrator had jurisdiction to go into this question. He has gone into that question and has awarded as he did.

Claim I is not outside the purview of the contract. It arises as an incident of the contract and the arbitrator had jurisdiction. In that view of the matter the objections raised against the award, cannot be sustained. No other objection was urged before us. The award, therefore, must be made the rule of the Court and there will be a decree in terms of the award, and the respondent is directed to pay Rs. 17,500 as the arbitrator's remuneration and Rs. 10,000 as advocates' fees and costs.

The Civil Miscellaneous Petition is disposed of accordingly.

N.V.K.

Petition disposed of.

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