
(1991) 04 SHI CK 0012
In the High Court Of Himachal Pradesh
Case No : C.S. No. 68 of 1990

Amar Nath Dhan Prakash

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 22-04-1991

Acts Referred:

Citation : (1991) 2 ShimLC 361

Hon'ble Judges : Kamlesh Sharma, J

Bench : Single Bench

Advocate : K.D. Sood, for the Appellant; R.M. Bisht, Law Officer, for the Respondent

Judgement

Kamlesh Sharma, J.—The State of Himachal Pradesh through the Executive Engineer, Paonta Division (B & R) entered into agreement No. 32 of 1968-69 with M/s. Amar Nath Dhan Parkash, Plaintiffs. The dispute arising out of this agreement has been decided by Sh. R.P. Malhotra, Superintending Engineer (Arbitration). H.P. P.W.D., Solan, vide his award dated 30-4-1990, whereby an amount of Rs. 4,08,844 has been awarded to the Plaintiffs-contractor besides release of F.D.R. for Rs. 20,000 which is lying with the Defendant as security. Interest at the rate of 9% per annum has also been granted by the Arbitrator if the award amount is not paid within two months from the date of making the award.

2. The award In question is not a speaking award. It is as under:

1. Whereas, I (Superintending Engineer) Arbitration, H.P. PWD, Solan was appointed as arbitrator by the Engineer-in-Chief, H.P.P.W.D., Shimla-1, vide his letter No. PW-CTR-29-15/72-Court Case-II-12516-19 dated 19-2-1988 to decide and make award regarding claims/counter claims of both the parties for the abovesaid work.

2. Whereas, I (Superintending Engineer) entered upon reference in this case w.e.f. 21st December, 1988 and took up the case from the stage left by my

predecessor Sh. J.R. Kainth as per the consent of both the parties. The hearing in this case was concluded on 10-3-1990. The time for conducting the hearings and announcement of award was extended up to 8-7-1990 on the mutual request of both the parties.

3. Now I (Superintendent Engineer) Arbitration, H.P. P.W.D., Solan having considered the whole matter submitted to my predecessor and me by both the parties both verbally and in writing with due care I hereby award a consolidated amount of Rs. 4,08,544 against all the claims put forth by the Plaintiff and Respondent to the extent of the claims judged admissible. The Respondent shall pay Rs. 4,08,544 to the Petitioner. This award is excluding FDR for Rs. 20,000 which the contractor had deposited as security with the department which will be returned to him alongwith the interest accrued till date separately. This award will carry an interest of 9% if this amount is not paid within 2 months from the date of making of award.

3. The Defendant have filed objections to the award and prayed for setting it aside. The Plaintiffs have tiled their affidavit-in-reply supporting the award.

4. On the pleadings of the parties, the following issues were framed:

1. Whether the Arbitrator has mis-conducted himself as also the proceedings as alleged? OP Objector.

2. Whether the Arbitrator was not entitled to grant interest at the rate of 9% on the amount of the award as alleged? OP Objector.

3. Relief.

5. The parties have adduced evidence by way of affidavits. I have heard the learned Counsel for the parties and gone through the record of this suit as well as the record of the Arbitrator. Sh. R.M. Bisht, Law (sic), appearing on behalf of the Defendant has mainly urged that the award is bad inasmuch as the arbitrator has considered the claim of the Defendant in respect of compensation for delay falling under Clause 16 of the agreement over which he had no jurisdiction. It is not diluted that in the total claim of the Defendant of Rs. 49,70,009 one of the items was of compensation for delay amounting to Rs. 2,97,229.10. The claim of the contractor was of Rs. 38,90,180.70. The arbitrator has given a consolidated award of Rs. 4,08,544 in favour of the Plaintiffs-contractor and the award in favour of the Defendant is nil As stated in the award, the arbitrator has "considered the whole matter submitted" to him and has made consolidated award "against all claims put forth by the Plaintiffs and Respondent to the extent of the claims adjudged admissible". Therefore, it cannot be denied that the arbitrator bad considered the claim of the Defendants falling under Clause 16 of the agreement.

Clause 16 of the agreement is as under:

The work comprised in this tender are to be commenced after 15 days on receipt

of written orders from the Divisional Officer to commence work. The time allowed for carrying out the work as entered in this tender shall be strictly observed by the contractor and shall be deemed to be the essence of the contract on the part of the contractor and shall be reckoned from the fifteenth day after the date on which the orders to commence the work is issued to contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one per cent, or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work shown in the tender, for every day that the work remains uncommenced, or unfinished after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds, one month (save for special jobs to complete one eighth of the whole of the work before one fourth of the whole time allowed under the contract has elapsed; three-eighth of the work, before one half of such time has elapsed, and three-fourth of the work, before three-fourth of such time has elapsed. However, for special jobs, if a time schedule has been submitted by the contractor and the same has been accepted by the Engineer in Charge, the contractor shall comply with the said time schedule In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten per cent on the estimated cost of the work as shown in the tender.

6. From a reading of Clause 16 of the agreement, it is clear that the Superintending Engineer is the final authority in respect of compensation for delay. Clause 29 of the agreement which pertains to arbitration excludes all those disputes from the jurisdiction of the Arbitrator about which provisions have been made in the agreement. Clause 29 of the agreement reads:

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specification, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question claim Tight, matter or than whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these omissions or otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, Himachal Pradesh, Public Works Department in charge of the work at the time of the dispute. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that had to deal with

the matters to which the contract relates and that in the course of his duties as Government servant he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or unable to act for any reason the Chief Engineer, H.P. Public Works Department shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Chief Engineer, H.P. PWD should act as arbitrator and, if for any reason, that is not possible, the matter is not to be referred to arbitration at all. Subject as aforesaid the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings, under this clause.

7. Both these clauses fell for consideration and interpretation of the Supreme Court in *Vishwanath Sood Vs. Union of India (UOI)* and Another, Clauses 2 and 25 mentioned in that judgment are almost similar to the Clauses 16 and 29 of the present case. While interpreting these two clauses, the Supreme Court held:

...As we see it Clause 2 contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, it seems to us, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion, the question regarding the amount of compensation leviable under Clause 2 has to be decided only by the Superintending Engineer and no one else.

...Clause 25 which is the arbitration clause starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have reference only to provisions such as the one in parenthesis in Clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words "except where otherwise provided in the contract" would become meaningless. We are therefore inclined to hold that the opening part of Clause 25 clearly excludes matters like those mentioned in Clause 2 in respect of which any dispute is left to be decided by a higher official of the Department. Our conclusion, therefore, is that the question of awarding compensation under Clause 2 is outside the purview of the arbitrator and that the compensation, determined under Clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator.

8. In view of the law laid down by the Supreme Court in *Vtshwanath Sood's* case (supra), it is clear that the arbitrator had no jurisdiction to consider the claim of the Executive Engineer in respect of compensation for delay. Therefore, the submission made by Sh. R.M. Bisht, Law Officer, is accepted.

9. The real question which arises for further decision is that whether the consideration of the claim of the Defendant in respect of compensation for delay under Clause 16 of the agreement makes the whole award bad or the award can be made rule of the Court since it is a non-speaking award and it cannot be deciphered whether the arbitrator has either adjudged it admissible or not.

10. Mr K.D. Sood, learned Counsel for the Plaintiff, has relied upon *State of Andhra Pradesh and another, etc. Vs. R.V. Rayanim etc.*, and urged that in the case of non-speaking award, it is not discernible on the face of the award that the Arbitrator has exceeded his jurisdiction, therefore, it is difficult to contend that the Arbitrator has exercised jurisdiction beyond his competence. On the other hand, Sh. R.M. Bisht, learned Law Officer, has argued that very consideration of the claim of compensation for delay under Clause 16 of the agreement vitiates the arbitration proceedings and the award. For his submissions, he has relied upon *M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya Project and another*, .

11. In my opinion, this case is distinguishable as sole item referred to the Arbitrator and adjudicated upon by him was found without jurisdiction. Therefore, the whole of the award was declared bad. When one of the items is found without jurisdiction and award is given lump sum and without reasons, an altogether different situation arises as in the present case. In *Prabartak Commercial Corporation Ltd 's* case (supra) the Supreme Court was faced with such a situation and held that:

From reading the award, as set out hereinbefore, it is clear that the arbitrator has considered the claim made on the basis of "escalation and damages" but he has awarded a total sum of Rs. 19.39 lakhs insofar as he finds admissible in respect of the claims which the arbitrator has adjudged. It speaks no further. In such a situation it is not possible to contend that there was any exercise of jurisdiction by the arbitrator beyond his competence. It is well settled that in matter of challenging the award, there are often two distinct and different grounds. One is an error apparent on the face of the record and the other is that the arbitrator has exceeded his jurisdiction. In the latter's case the Court can look into the arbitration agreement but under the former it cannot unless the agreement was incorporated or recited in the award. An award may be remitted or set aside on the ground that the arbitrator, in making it, had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has to be determined outside the award-whatever might be said about it in the award or by the arbitrator. See the observations of this Court in *Sudarshan Trading Co. v. Govt. of*

Kerala (1988) 2 SCC 38 : AIR 1979 SC 890.

Only in a speaking award the Court can look into the reasoning of the award. It is not open to the Court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

...The fact that the arbitrator has considered the claim made by the Respondent on account of escalation, does not make per se the award to be bad. Mr. C. Sitaramiah, learned Counsel appearing for the Appellant contended that the fact that the arbitrator has taken into consideration the question of escalation would make the award bad because it is not discernible whether he has awarded any amount on account of escalation. We are of the opinion that this argument is not open. In case of an error apparent on the face of the record, it has to be established that an item or an amount which the arbitrator had no jurisdiction to take into consideration, has been awarded or granted. That is not apparent on the face of the award in this case. All that the award states is that he has considered the claim on the basis of escalation. Such a consideration does not make the award on the face of it, bad on the ground of error apparent on the face of the record. Indeed, the arbitrator, when a claim is made, has to take that into consideration either for acceptance or rejection of the claim made. The award states that he has taken the claim made, into consideration. The award does not state that he has awarded any amount on that account. There is neither any error apparent on the face of the record, nor any material to satisfy that the arbitrator has exceeded his jurisdiction in awarding the amount as he did.

12. The law laid down by the Supreme Court in *Prabartak Commercial Corporation Ltd.*'s case (supra) is complete answer to the present case. The contention of Mr K.D. Sood, learned Counsel for the Plaintiff, is accepted. The fact that the arbitrator has considered the claim of State in respect of compensation for delay under Clause 16 of the agreement does not make the award per se bad. The award being non-speaking, there is nothing in it to come to the conclusion that whether the arbitrator has adjudged the claim in question admissible to State or not and further that he has exceeded his jurisdiction. For the same reasons, it cannot be said that there is any error apparent on the face of record. Therefore, the award dated 30-4-1990 given by the Superintending Engineer (Arbitration), Solan, for an amount of Rs. 4,08,544 in favour of the Plaintiff-contractor is made rule of the Court. There is no order as to costs.