
(1995) 11 OHC CK 0012
In the Orissa High Court
Case No : Misc. Appeal No. 231 of 1992

Asia Foundation and Constructions Limited (AFCONS)	APPELLANT
Vs	
State of Orissa	RESPONDENT

Date of Decision : 03-11-1995

Acts Referred:

Arbitration Act, 1940 — Section 30

Citation : (1996) 1 OLR 65

Hon'ble Judges : R.K. Patra, J

Bench : Single Bench

Advocate : B. Pal and D.N. Ghose, for the Appellant; S.K. Das, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.K. Patra, J.—This appeal filed u/s 39 of the Arbitration Act, 1940 (hereinafter referred to as "the Act") is directed against the order of the learned Subordinate Judge. Bhubaneswar refusing to set aside the award and making it the rule of the Court.

2. The respondent-State of Orissa represented by the Executive Engineer, Kapur Dam Division, Indravati Project laid a claim of Rs. 9,62,305/- against the appellant before the Arbitration Tribunal, Orissa vide claim case No. 14 of 1985. The appellant made a counter claim of Rs. 1,66,532/- as compensation for idle labour due to interrupted power supply, Rs. 3,15,700/- towards extra chiselling rate and refund of security deposit of Rs. 1,21,960/-. The Arbitration Tribunal (hereinafter referred to as "the Tribunal") rejected the counter claims laid by the appellant. It however, awarded a sum of Rs. 6,03,450/- in favour of the respondent against the total claim of Rs. 9,62,305/-. After receipt of the award from the Tribunal in the Court, the learned Subordinate Judge issued notice to the parties. The appellant filed objection u/s 30 and 33 of the Act to set aside the award. The learned Subordinate Judge over-ruled the objection and refused to set aside the award by the impugned order which as already noted, is the

subject-matter of challenge.

The case of the respondent as disclosed in its claim statement before the Tribunal is as follows :

Pursuant to the tender call notice issued by the Executive Engineer, Podagada Dam Division for the work of "construction of Twin Discharge wall below the foundation base of Kapur North Dam of Upper Indravati Project" the appellant M/s. Asia-Foundation and Constructions Limited submitted its tender which was accepted by the State Government in the Irrigation and Power Department for a tendered amount of Rs. 60,84,500/-. Accordingly, agreement No. 27-F-2 of 1981-82 was executed between the appellant and the concerned Executive Engineer. The date of commencement of the work as per the agreement was 4-12-1982. A sum of Rs. 4 lakhs was paid on 1-2-1982 to the appellant towards site installation/mobilisation. The appellant commenced the work as stipulated in the agreement and continued to work till 3-4-1982. By 17-2-1982 the appellant executed panel No 18 which was measured in 2nd R/A bill and was paid Rs. 3,19,985/- by the Executive Engineer. Subsequently, it executed panel No. 20 which was measured in 3rd running bill and the Executive Engineer on 18-3-1982 paid a sum of Rs. 2,42,320/- to the appellant. The appellant was thus, paid a sum of Rs. 3,62,305/- which included Rs. 4 lakhs received as advance) for execution of the aforesaid two panels. The progress of the work was not as per the agreement and with a view to cover up its lapses the appellant insisted for installation of stand by diesel generators for continuity in power supply to avoid idling of its machineries. The appellant was clearly informed that it would be duly granted extension of time equal to the total period of power failure. Although the appellant was given all facilities for clue execution of the work, it instead of speeding up the progress of the work started removing the equipments, machineries etc. from the site. Ultimately, the appellant completely stopped the work and abandoned the site. By the construction of only two panels out of forty panels, the very purpose for providing an impervious curtain in the deepest section of the dam could not be done and the respondent took up alternative design for excavation of open cut off. On account of adoption of alternative design, the work done by the appellant (construction of two panels) became totally useless for the department and it suffered a loss of Rs. 9,62,305/-. It is accordingly entitled to receive the said amount from the appellant with 12% interest thereon.

The appellant after receiving notice from the Tribunal filed its counter denying the claim. The appellant in its counter pleaded. inter alia, that the notice inviting tender contained quantities of various items of work to be executed, the specifications, method of execution along with maps and sections showing the discharge wall. The drawings appended did not indicate the presence of any layer of boulders, but showed a firm rockline underlying the over-burden. Basing on such data contained in the notice inviting tender, it submitted its tender. The concluded agreement containing the bill of quantities of various elements

provided for chiselling to bore through hard rock etc, and provided for a total of 2400 hours of chiselling for 4680 square meters of disphargm which meant approximately 0. 8 hours of chiselling for every square meter of diaphragm wall. This fact together with the drawings in the notice inviting tender gave the picture that they were hardly in bouldery layers present in the sub soil. It is a well known fact that in bouldery layers the boring of discharge on large scale is extremely difficult and if they are massive enough, it may well become impossible even with reverse circulation rigs. The appellant quoted its rate on the basis of tender drawings and with a belief that it was required to chisal in rock of approximately 0.5 hours/square meters of disphragm wall only and had provided their equipment and submitted rates accordingly. It had no reason to question reliability of the technical data supplied by the Executive Engineer. The appellant duly mobilised its rigs and demanded power either direct and/or through stand-by generator sets for operation of rigs. The department did not supply power as per the requirement either directly or by providing stand-by generators. By the time it completed two panels, it was found that there was a massive layer of boulders of several meters overlying the bedrock, boring through which was impossible. In the circumstances, the appellant intimated the department that the execution of disphragm wall became impossible for performance and the contract should therefore be treated as furstrated. The whole problem was discussed with the Chief Engineer of Central Water and Power Commission during his visit when the appellant explained the impossibility of construction of disphragm wall in view of the type of starta met with and alternatives were suggested. That the execution of disphragm wall was impossible for performance is established when the department itself adopted alternative methods of cut off wall. The appellant was, therefore, released from contractual obligations under the law and the contract stood frustrated and there was nothing wrong for the appellant from withdrawing from the site. The appellant accordingly, pleaded in its counter that it is not obliged to reimburse any money to the department.

3. The respondent and the appellant filed their respective documents before the Tribunal who after hearing both parties rejected the counter claim laid by the appellant and awarded a sum of Rs. 6,08,450/- in favour of the respondent and against the appellant. The Tribunal held that the agreement is silent about refund of any amount paid to the contractor (appellant) in the event of non-completion of the work in question and as such, it cannot make any award in respect of the amount already received by the contractor (appellant) from the State Government Having held so, the Tribunal declared that the respondent is entitled to Rs. 6,08.450/-as compensation for breach of the conditions of the contract being 10 per cent of the agreed value of the work of Rs. 60.84,500/-.

4. Shri Pal, learned counsel for the appellant confined his argument only with regard to the validity of the award passed for Rs. 6,08,450/-. Following are his contentions :

(i) The Tribunal having rejected the claim of reimbursement made by the

respondent has made out a third case which was not at all pleaded by the appellant in its claim statement. To put it differently, the dispute as to whether the appellant was liable to pay compensation for breach of conditions of contract was never raised and in absence of any such dispute, the award of Rs. 6,08,450/- as compensation for breach of the condition of the contract is without jurisdiction.

(ii) There being frustration of contract u/s 56 of the Indian Contract Act, 1872, the contract became impossible to be performed and as such, it has become void and the entire contract having become void, the arbitration clause contained therein does not independently survive and perishes with the contract itself.

The learned counsel appearing for the respondent submitted that the Court should always endeavour to up-hold the award in view of the fact that the concerned parties entrusted the dispute to be resolved by an arbitrator chosen by the parties to the dispute.

5. In view of the arguments of Shri Pal, it is relevant to quote the observations made by the Tribunal in the award which read as follows :

1. The Respondent contracting firm did not do proper site investigation and soil exploration and did not undertake the proper analysis of the sub-soil to assess the complexity of the work.
2. They unilaterally withdrew their machineries in spite of repeated forbidence of the sits in-charge and unilaterally abandoned the work.
3. The respondents withdrew their machineries of flymay and false grounds very much misleading the claimant and leff the work in such a stage when only 5% of the work had been executed which is neither useful to the claimant nor has been done in proper scientific manner as prescribed in the agreement.
4. The respondents have not given full notice of their intention before abandoning the work. So they have not done proper justice to the contract entered into between the parties.

The Agreement being silent about refund of anything paid In the contract or In the event of his non-completion of the work in dispute, the Tribunal cannot make any award in respect of the amount already received by the present respondents from the claimant.

The work in question having admittedly remained Unfinished obviously on account of unilateral abandonment of the same by the Respondent, the insignificant portion of the work said to have been executed by the Respondent cannot be disputed to have become infructuous, resulting thereby a tremendous loss of such huge amount as Rs. 9,62,300/- to the claimant. The respondent being unquestionably the only competent agency to execute, the special nature of work in question, the claimant in consequence of unilateral abandonment of such work by the respondent, had no alternative than to get the work done

through other agency with a different design, for which the loss to the claimant cannot be doubted to have been accelerated to a major degree. In such premises, the claimant has considered refund of the aforesaid amount as compensation for the colossal loss it has sustained. It is true that the claimant before coming for arbitration of the dispute, has not formally noticed the respondent in writing for payment of the aforesaid amount or any other amount towards the loss sustained by it in consequence of wilful abandonment of the work. But the claimant having pressed for payment of the aforesaid amount of Rs. 9,62,305/- shall be deemed to have asked for the amount as compensation or penalty. When the agreement does not postulate service of any notice by either party on the other for payment of any compensation or penalty for such action as of the respondent, it does not appear obligatory on the part of the claimant to invoke Clause 23 of the F-2 Agreement in question in relation to compensation and/or penalty before taking recourse to arbitration of the dispute. However, the claimant having sought for payment of the aforesaid amount by the respondent shall be deemed to have done so for breach of the conditions of the contract as incorporated in the said clauses of the Agreement. Since this Tribunal as Arbitrator cannot award any compensation or penalty in excess of 10% of the Agreement amount, the Tribunal in consideration of the facts and circumstances of the case as enumerated above, would deem it expedient in the interest of justice and equity that the respondent should pay 10% of the Agreement value of Rs. 60,84,500/- i. e. Rs. 6,08,450/-".

6. The clear and specific case of the respondent in its claim statement is that the appellant after constructing two panels of the disphargm wall abandoned the work on account of which the department decided to have an altogether different design of excavation of open cut off and as such the, work done by the appellant became totally useless for the department resulting in loss of Rs. 9,62,305/- to which the respondent is entitled to be reimbursed. The Tribunal has given a clear and categorical finding to the effect that "the agreement being silent about refund of anything paid to the contractor in the event of his non-completion of the work in dispute, the Tribunal cannot make any award in respect of the amount already received by the present respondents (contractor) from the claimant (Government)". Having declared the dis-entitlement of refund of payment received by the appellant whether the Tribunal would be competent to award any amount as compensation or penalty for breach of the condition of the contract in absence of specific dispute being raised ? in my considered opinion the Tribunal could do so provided specific dispute on that count was raised by the respondent- A bare perusal of the claim statement makes it clear that no dispute as to the appellant's liability to pay compensation or penalty for breach of contract was raised before the Tribunal. The only dispute that was raised by the respondent was the loss sustained by it on account of payment of Rs. 9,62,305/- for construction of two panels which have become useless because alternative design was adopted in place of construction of forty numbers of panels. That there was no such dispute ever raised by the respondent is abundantly clear from

the finding recorded by the Tribunal itself in the award. The Tribunal says "it is true that the claimant (respondent-State) before coming for arbitration of the dispute, has not formally noticed the respondent in writing for payment of the aforesaid amount or any other amount towards the loss sustained by it in consequence of wilful abandonment of the work".

7. It is well settled that a dispute implies on assertion of a right by one party and a repudiation thereof by another. In the present case, the respondent never asserted its right to claim compensation or penalty on account of breach of the conditions of contract. The claim statement filed by the respondent clearly goes to show that no such dispute and/or claim was laid before the Tribunal. It has been held by Ramkin, J. in *Uttam Chand Saligram v. Mahmood Jewe Mamooji* : AIR 1920 Cal 143 that it is an essential condition for an arbitrator's jurisdiction that at the time the arbitration is demanded there shall be in existence a dispute. In *Halsbury's Laws of England* (4th edition Vol. 2, para-694) one of the misconducts enumerated is the decision by the Arbitrator on a matter which is not included in the reference. For the aforesaid reasons, the Tribunal could not have granted the award in favour of the respondent in absence of any reference and/or dispute raised. The Tribunal has clearly miscondacted itself in the matter and as such, the award cannot be sustained in law.

In view of what has been stated above, it is not necessary to consider the second contention raised on behalf of the appellant.

8. In the result, the award of Rs. 6,08,450/- in favour of the respondent and the order of the learned Subordinate Judge making the same the rule of the Court are hereby set aside. The appeal is allowed. No costs.