

(2017) 10 RAJ CK 0017
In the Rajasthan High Court
Case No : 780 of 2001

M/s. Emerald Industries, S-553, Greater Kailash	APPELLANT
Vs	
Rajasthan State Mines & Minerals Ltd.	RESPONDENT

Date of Decision : 03-10-2017

Acts Referred:

[Arbitration Act, 1940](#), [Section 39](#), [Section 14](#), [Section 33](#), [Section 30](#) - Appealable orders - Award to be signed and filed - Arbitration agreement or award to be

Citation : (2017) 10 RAJ CK 0017

Hon'ble Judges : Arun Bhansali

Bench : SINGLE BENCH

Advocate : Shreyansh Mardia, Rajat Dave

Final Decision : Dismissed

Judgement

1. This appeal under Section 39 of the Arbitration Act, 1940 is directed against the judgment dated 15/1/2001 passed by the Addl. District Judge No.2, Udaipur ("the trial court"), whereby, the prayer made by the appellant to set aside the award dated 6/3/1995 has been rejected.
2. The appellant is a contractor experienced in civil engineering with specialization in construction of Mine Haulage Roads. The respondent, Rajasthan State Mines & Minerals Ltd. ("RSMML"), is a Government of Rajasthan undertaking; the respondent RSMML invited tenders for construction of mine haulage road including cross drains, retaining walls, toe walls etc.; the appellant along

with other tenderers submitted its tender; the tenders were opened on 30/6/1989; after negotiation, a Telex of Intent dated 28/10/1989 awarding the contract to the appellant was received by the appellant on 3/11/1989 requiring the completion of tendered work within a period of 12 months from the date of telex i.e. 28/10/1989 and the gross value of the contract was Rs.1,17,73,506/-.

3. On a dispute having arisen between the parties, one Mr. V.C.Puri was appointed as sole arbitrator by the Managing Director of RSMML on 15/11/1991. The appellant submitted his claim in January, 1992, which was responded by the RSMML on 3/2/1992, a rejoinder by the appellant was submitted on 4/5/1992. The Arbitrator formulated 10 points for determination i.e. "A" to "J" and by his award dated 6/3/1995 awarded a sum of Rs.1,48,000/- and Rs.3,67,000/- towards claim "B" and "H", respectively, rest of the claim was rejected.

4. The award was filed in the court under Section 14 of the Act and the learned District Judge issued notices to the parties. The appellant filed his objections under Sections 30 and 33 of the Act seeking setting side of the award/modification of the same. By the impugned judgment dated 15/1/2001, the application filed by the appellant was rejected and the award was made rule of the court. Feeling aggrieved, the present appeal has been filed by the appellant.

5. Learned counsel for the appellant made submissions questioning the legality and validity of the award as well as the judgment of the trial court, the findings recorded by the Arbitrator on various issues were contested. It was submitted that the main issue relating to claim of the appellant pertain to controlled blasting undertaken by him and the payment in terms of the

agreement for the said controlled blasting. It was submitted that the Arbitrator in his award, though held in favour of the appellant that it was entitled to the additional amount payable for controlled blasting, on account of minutes of meeting dated 16/3/1990, the said claim has been rejected. It was submitted that after the minutes of meeting dated 16/3/1990 were recorded, a detailed Letter of Intent dated 6/4/1990 was issued by the respondent superseding all other correspondence and further in agreement dated 6/4/1990 executed between the parties, there was no reference to the minutes dated 16/3/1990 and, therefore, once after the meeting dated 16/3/1990 when detailed Letter of Intent has been issued and agreement entered into between the parties, the same contain the final terms and conditions between the parties and as such, the Arbitrator was not justified in relying on the minutes of meeting dated 16/3/1990 and, therefore, the conclusion arrived at by the Arbitrator and upheld by the trial court deserve to be quashed and set aside.

6. With respect to claim "B" relating to land filling work beyond the contract requirement done by the appellant, it was submitted that the Arbitrator instead of claim of Rs.31,29,875/- has awarded a sum of Rs.1,48,000/- only by relying on the contract document of one M/s. R.K.Singhvi, which document was not part of the record and, therefore, the findings/award of the Arbitrator in this regard cannot be sustained.

7. Qua claim "C" pertaining to construction of approach roads outside the contractual responsibility, it was submitted that the Arbitrator was not justified in coming to the conclusion that the construction of approach roads were part of the contract and with reference to condition 17.4 and Special Conditions 3.3. and 3.4 it was emphasized that the Arbitrator was not justified in denying

the amount towards construction of approach roads. Further, the determination made by the trial court was also not justified.

8. Learned counsel made submissions pertaining to claim "D", "E", "F", "G" & "I" also questioning the denial of the claim by the Arbitrator on several grounds. It was prayed that the award impugned to the extent the same has rejected the claim of the appellant deserves to be set aside and the judgment passed by the trial court making the same rule of court also deserves to be set aside.

9. Reliance was placed on *Young Achievers vs. IMS Learning Resources Pvt. Ltd . : (2007) 5 SCC 692*, *Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises & Anr . : (1999) 9 SCC 283*, *V.G.George vs. Indian Rare Earths Ltd. & Anr . : (1999) 3 SCC 762* and *D.C.M. Ltd. vs. Municipal Corporation of Delhi & Anr . : (1997) 7 SCC 123*.

10. At the outset, learned counsel appearing for the respondent submitted that the appellant though has made submissions pertaining to all the claims rejected by the Arbitrator, before the trial court, objections were confined to three claims only i.e. claim "A", "B" & "C" and, therefore, now the appellant cannot be permitted to raise objections pertaining to all other claims. Submissions were made that though the agreement was entered into between the parties on 6/4/1990, pursuant to the Letter of Intent, the appellant had already commenced the work in November, 1989 and during the said period, on the issue pertaining to controlled blasting having arisen, the minutes dated 16/3/1990 came into existence dealing with the said aspect. It was submitted that the conduct of the appellant in working under the said minutes dated 16/3/1990 by not claiming bill amount in running bills and raising demand in final bill clearly creates estoppel against the appellant

and, therefore, the Arbitrator as well as the trial court were justified in rejecting the claim.

11. Further submissions were made that the entire agreement relied on by the appellant does not even deal with the aspect of controlled blasting and it is only the minutes dated 16/3/1990 which deals with the aspect of controlled blasting and on that count also the appellant cannot claim any amount as the minutes dated 16/3/1990 have to be read as a whole and not in piecemeal.

12. With respect to claim "B", it was submitted that the Arbitrator awarded the amount by relying on the material which came before him during the course of arbitration including the contract of M/s. R.K.Singhvi. Other than the said material, there was no material available before the arbitrator to determine the claim made by the appellant and, therefore, the arbitrator was justified in relying on the said contract of M/s. R.K.Singhvi. It was further submitted that the awarded amount under claim "B" is essentially a question of fact which has been determined by the Arbitrator and upheld by the trial court, which does not call for any interference.

13. With respect to claim "C" pertaining to construction of approach road outside the alleged contractual responsibility, it was submitted that the Clause 17.4 of general obligations as well as Special Conditions 3.3. and 3.4 takes care of the said claim raised by the appellant, which has been appropriately dealt with by the Arbitrator and no interference in the said finding is called for.

14. Reliance was placed on *Kanchan Udyog Limited vs. United Spirits Ltd* . : (2017) 8 SCC 237, *Cauvery Coffee Traders, Mangalore vs. Hornor Resources Co. Ltd* . : (2011) 10 SCC 420, *Harish Chandra & Co. vs. State of U.P* . : (2016) 9 SCC 478, *Union of India & Ors. vs. M/s. Onkar Nath Bhalla & Sons* : AIR 2009 SC 3168.

15. I have considered the submissions made by learned counsel for the parties and have perused the material available on record.

16. So far as the challenge laid by the appellant to all the claims, which have been rejected by the Arbitrator i.e. claim "A" to "J" except claim "H" is concerned, a bare look at the judgment dated 15/1/2001 of the trial court reveals that in para 7 the trial court has noticed the objections raised by the appellant and the said objections pertain to claim "A", "B" & "C" only and the trial court has dealt with only those objections and having rejected those objections, made the award rule of court.

17. In the memo of appeal, grounds have been raised questioning the validity of rejection of all the claims up to ground "O", thereafter, one page 39-A between para 39 and 40 has been inserted raising a ground that the lower court erred in law in not considering the objections raised in the objection petition of the appellant and the lower court was under an obligation to consider as per law to deal with and decide all the claims in accordance with the law as objections were raised in the objection petition qua all the claims and, therefore, the order is required to be set aside.

18. As already noticed hereinbefore, from the order passed by the trial court it appears that only rejection of 03 claims was questioned/pressed by the appellant, therefore, now it is not open for the appellant to question the validity of the judgment of trial court on account of having allegedly pressed the grounds pertaining to all the rejected claims. Law in this regard is very clear. Hon"ble Supreme Court in State of Maharashtra vs. Ramdas Shrinivas Nayak & anr. : (1982) 2 SCC 463 has laid down as under:-

"Statement of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that

the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course, a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession as made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment."

19. In view of the above, the plea sought to be raised by the appellant cannot be countenanced.

20. So far as the claims dealt with by the trial court are concerned, it is not in dispute that the Letter of Intent dated 28/10/1989 was received by the appellant on 3/11/1989 and the period of completion was to be reckoned from the date of Letter of Intent i.e. 28/10/1989. In the claim petition, the appellant inter alia indicated as under, which clearly reflects that the work was commenced in November, 1989 itself and till March the appellant had already completed the work exceeding Rs.50 Lakh out of total contract for gross value of Rs.1,17,73,506/-:

"6. We displayed our diligence by mobilising our machines and men and actually commenced the work in Nov. 1989 without receiving promised Mobilisation advance from RSMML of Rs.11.77 Lakhs till 27 th Feb. 1990. We had thus started the work & continued for six months from funds drawn from our own resources. 7. Not a single Running Account Bill was paid to us till March 1990 by which time we had already carried out work exceeding Rs. 50 Lakhs. Thereafter every bill paid had to suffer enormous deduction based on whimsical & arbitrary interpretation of the contract provision by EIL/RSMML & we were pushed into acute financial straits. In short, our diligence Exploited by EIL/ RSMML to cover their own weaknesses, inadequacies & lack of diligence."

21. The above submissions in the Statement of Claim clearly establishes that the appellant had undertaken a large part of the work by the time the agreement dated 6/4/1990 was executed between the parties. In the meanwhile, the meeting

dated 16/3/1990 was held between the appellant, RSMMML and Engineers India Limited, wherein, the issue regarding the controlled blasting was discussed and concluded, the minutes were drawn whereby, the "controlled blasting" was defined, it was indicated that when blasting is done only with sand bags, it will be considered as un-controlled blasting and the rates will be paid as per S.O.R Item No.3.1 (d) and it was also agreed that the said terms would form part of the contract and would be incorporated in the contract documents.

22. The appellant has not denied the existence of said minutes and the fact that the said aspect was agreed to between the parties. However, it was vehemently submitted that as the detailed Letter of Intent dated 6/4/1990 did not make any mention of the minutes dated 16/3/1990 and provided that "the contract agreement supersedes all other correspondence exchanged prior to issue of this detailed Letter of Intent" and Clause "C" of the agreement dated 6/4/1990 duly executed between the parties also did not make any mention of the minutes dated 16/3/1990, though exhaustively indicated all other documents executed between the parties, in terms of Section 62 of the Contract Act, 1872, unless the contract was altered, the minutes dated 16/3/1990 could not have been relied on by the respondent and the Arbitrator.

23. As already noticed, the appellant had started working from November, 1989 and had already undertaken large part of the work and, thereafter, it agreed for defining the controlled blasting and accepted that blasting done only with sand bags will be considered as un-controlled blasting, therefore, only on account of the fact that the formal agreement was entered into between the parties on 16/4/1990, which did not make any

mention of the minutes dated 16/3/1990, by itself cannot be a ground to come to a conclusion that the minutes dated 16/3/1990 were cautiously given a go-bye and/or the parties agreed for treating the blasting done with sand bags also as controlled blasting entitling the appellant to claim amount for blasting done with sand bags as controlled blasting.

24. The Arbitrator while dealing with the said aspect of the matter, though came to the conclusion that blasting carried out even with the aid of sand bags was controlled in nature, in view of the minutes dated 16/3/1990 rejected the claim.

25. Hon"ble Supreme Court in the case of Kanchan Udyog (supra) while dealing with the aspect of novation of a contract relying on its earlier judgment held that the same could take place sub silentio and that waiver could also be deduced from acquiescence.

26. Further in the case of Cauvery Coffee Traders (supra), it was laid down that unless the allegation of misrepresentation, fraud or coercion are made, it is not open to either of the parties to raise the claim.

27. So far as the reliance placed by counsel for the appellant on the judgment in case of Young Achievers (supra) is concerned, the said judgment pertain to the survival of arbitration clause once the contract containing the arbitration clause is superseded by fresh contract, which aspect has no application to the facts of the present case as the issue raised in the present case pertains to conduct of the appellant in accepting a particular interpretation/condition and having worked under it without raising any objection.

28. In view of the above discussion, the plea sought to be raised by the appellant relying on the fact that final Letter of

Intent and agreement dated 6/4/1990, which was executed almost after six months from the date of commencement of work, did not include the minutes dated 16/3/1990, which were drawn during the progress of the work settling the terms pertaining to controlled/un-controlled blasting, has no substance and the same is, therefore, rejected.

29. So far as the ground pertaining to claim "B" for the land filling work done by the appellant beyond the contract requirement is concerned, the Arbitrator relying on the contract document of M/s. R.K.Singhvi awarded a sum of Rs.1,48,000/- to the appellant. The appellant in his claim had claimed a sum of Rs.31,29,875/- towards the said claim, however, no basis whatsoever was disclosed in the said claim by the appellant. Learned counsel for the appellant also fairly conceded that there was no material available on record to substantiate the said claim of Rs.31,29,875/-.

30. So far as the contract of M/s. R.K.Singhvi is concerned, which has been relied on by the Arbitrator, though the source of the said contract is not available on record, the same factually forms part of the record of Arbitrator which he had submitted to the District Court and has been perused by this Court.

31. In these circumstances and on account of the fact that respondents have not questioned the award of sum of Rs.1,48,000/- to the appellant, the claim sought to be raised by the appellant without any substantiation available on record also cannot be countenanced and the objections in this regard have no substance.

32. Insofar as the claim "C" pertaining to construction of approach roads is concerned, the Arbitrator relying on clause 17.4 of General Conditions of Contract came to the conclusion that the

construction of approach road being part of the contract rejected the claim. Clause 17.4 of the General Conditions of Contract provides as under:-

"17.4 Wherever it is mentioned in the specifications that the Contractor shall perform certain work provide certain facilities, it is understood that the contract shall do so at his cost."

33. Further, it was indicated in Clause 3.2 and 3.3 of the Special Conditions of Contract as under:-

"3.2 The present scope for mine haulage road includes only construction of embankment/formation width, construction of the drainage system and stability of the cut and fill slopes with toe wall and retaining wall and benching etc. 3.3 The contractor shall acquaint himself with the access to the site, availability of local facilities such as transport facilities, material and labour and shall provide suitable allowance in his quotation."

34. Once the General Conditions require the appellant to acquaint himself with the access to the site, availability of local facilities and it was required of the appellant to provide for suitable allowance in his quotation in this regard, the claim sought to be made pertaining to construction of approach road, cannot form part of the excess work and the same shall be deemed to be part of the contract as the appellant was required to visit the site before participating in the tender process and if the requirement was that of construction of approach road for reaching the site, the said work cannot be said to be outside the scope of work and was bound to be included by the appellant in the tender quotation and, therefore, the claim made in this regard cannot be sustained.

35. So far as the judgments cited by the learned counsel for the appellant in the case of Rajasthan State Mines & Minerals (supra) and V.G.George (supra) are concerned, none of the principles laid down therein have any application to the facts of the present case, the judgments as such have no application.

36. In view of the above discussion, there is no substance in the appeal and the same is, therefore, dismissed.

37 No order as to costs.