
(1990) 04 MP CK 0008
In the Madhya Pradesh High Court
Case No : M.A. No. 152 of 1988 (J)

M/s. Tarapore and Co. Engineers and Contractors	APPELLANT
Vs	
State of M. P.	RESPONDENT

Date of Decision : 17-04-1990

Acts Referred:

Arbitration Act, 1940 — Section 30(a), 39

Citation : (1991) MPJR 132

Hon'ble Judges : E. M. Agarwal, J; B. C. Verma, J

Bench : Division Bench

Advocate : F.S. Nariman and U.R. Rao, for the Appellant; M. V. Tamaskar, A.G., S.L. Saxena, Add. A.G., P.C. Naik, Dy. A.G. Deepak Verma, G.A., for the Respondent

Final Decision : Dismissed

Judgement

K. M. Agarwal, J.

This is an appeal u/s 39 of the Arbitration Act, 1940, (in short, the "Act"), by the contractor against setting aside of the Award u/s 30 (a) of the Act by the District Judge, Jabalpur.

It is not in dispute that in response to notice inviting item rate tenders for certain specified work of Bargi Masonry Dam issued by the respondent, the appellant had submitted its tender for Rs. 12,25,36,000/- in the year 1977, which was accepted and the formal contract between the parties was executed on 6-10-1978, Clause 4.3.24.1 of the contract provided that : "The contractor shall pay not less than fair wages to the labour engaged by him on the work." The term "fair wages" was defined as follows :

Fair wages means wage whether for the of time or piece work notified at the time of notice inviting tender for the work and where such wages have not been notified the wages prescribed by the Irrigation Department for the division in which the work is done.

The wages of skilled, semi-skilled and unskilled workers prevalent on the date of notice inviting tenders were revised from time to time by the State Government during the progress of the work under the contract and the contractor was required to pay the enhanced wages to its workers accordingly. After making payment of enhanced wages as per various letters sent to it by the Labour Welfare Officer, Bargi Project, the contractor went on making timely and persistent claims for reimbursement for the increase in wages implemented by it. Ultimately a claim to the tune of Rs. 3,42,69,847/- for the period upto 31-8-1984 was raised towards difference between the revised wages paid and the prevailing fair wages on the date of inviting tenders. In a meeting held on 7-4-1984 between the parties, the matter was discussed and by letter dated 16-4-1984 written by the Superintending Engineer, it was informed that the claim was rejected as there was no escalation clause in the contract. Not satisfied with the rejection of its claim, the contractor resorted to arbitration by filing an application u/s 20 (I) of the Act in Court in terms of clause 4.3.29 (2) of the contract, which provided for reference of disputes to arbitration of two persons, one each to be nominated by either party to the dispute, the two arbitrators having authority to select an umpire to resolve their differences, if any. The application was allowed and the following question was referred for determination to the arbitration of Brig. D. R. Kathuria (appointed by the contractor) and Shri V. M. Chitale, Irrigation Secretary (Redt), Bhopal (appointed by the State) by order dated 12-4-1985 :

Whether the State is not liable to reimburse to the applicant Rs. 3,42,69,847-00 for the period 7-8-79 to 31-8-84 on account of difference in wages.

By his letter dated 17-3-1986, Brig. D. R. Kathuria expressed his inability to act as an arbitrator and resigned. The vacancy thus created was filled in by Shri K. C. Goyal in pursuance of his appointment by the contractor- After holding several sittings, hearing the parties and examining the evidence produced before them, the arbitrators gave their first Award dated 20-12-1986 within the extended period, which was to the following effect :

The Respondent shall pay to the claimants a sum of Rs. 2,36,00,000-00 only (Rs. two hundred thirty six lakhs only) on account of the Principal amount of the claim, together with simple interest 12% per annum on the Principal amount of the claim from the date of Award to the date of payment or decree whichever be earlier.

The Award was filed in Court on 1-1-1987 and was challenged by the State by filing an application u/s 30 of the Act on 23-1-1987. The objections prevailed and the Award remitted back to the arbitrators u/s 16 (1) (c) of the Act by order dated 6-5-1987. The operative part of the remand order was as follows:

Hence the objections raised by the State are accepted. But in my view the whole Award is not required to be set aside. This is a fit case in which Section 16 (1) (c) may be used to correct the mistake. Accordingly, the Award is remitted to the

Arbitrators for reconsideration with the direction that keeping in view the above legal arguments, they shall give a fresh Award of this matter within a period of four (4) months from today. The State shall make measurement books etc. available to the Arbitrators if so required by them. The contractor-company also shall make their record available to them as and when required.

After the remand, the arbitrators reconsidered the matter in the light of new materials brought on record and gave their Second Award dated 24-9-1987 within the extended period in following terms :

The Respondents are directed to pay to the claimants the said sum of Rs. 236.00 Lakhs (Rs. two hundred and thirty six lakhs) together with simple interest at 12% per annum on this Principal amount from the date of Award till the date of payment or decree whichever is earlier.

The second Award was filed in the Court on 5-10-1987, which was sought to be set aside by the State on the ground of misconduct by filing an application u/s 30 of the Act on 2-11-1987. The application was allowed and the entire Award was set aside by the impugned order of the District Judge passed on 27-1-1988. Being aggrieved, the contractor has preferred this appeal u/s 39 (1) (vii) of the Act.

Before going to the arguments advanced by the learned council for the parties, it would be appropriate to know how the District Judge came to the conclusion that the Award was liable to be set aside on the ground of misconduct. In paragraph 6 of the impugned order, it was observed that the question referred to the arbitrators consisted of two parts. By the first part, they were required to decide whether the State was liable for reimbursement. By the second part, they were asked to work out the actual amount of difference in wages, which might be payable by the State. "After reading the Award, it is obvious that arbitrators have only considered the amount of difference in wages which can be reimbursed by the State. They did not at all consider whether the State was liable to reimburse that amount. In other words, they presumed that the State must reimburse the amount of Rs. 2,36,00,000/- to the contractor. In the earlier Award, dated 20-12-1986 also the arbitrators have not considered this point. They have directed the State to pay the aforesaid amount to the contractor without giving a finding that the State is liable to pay the difference in wages. After discussing the arguments and the case laws, the learned District Judge concluded in paragraph 15 of his impugned order that by omitting to decide the question of liability and by ignoring to consider the relevant clauses of the contract in that regard, the arbitrators misconducted the proceedings and committed an error in presuming the State liable for reimbursement. It was further held in paragraph 16 of the impugned order that the arbitrators further misconducted the proceedings by deciding the quantum of liability in the absence of any evidence about actual payments made to the workers and on the basis of the evidence of two sub-contractors to the effect that enhanced payments to the workers included their profit of about 5%. "But all the sub-contractors were not examined not the

documents of payments were produced. After considering the evidence of some of the sub-contractors it was presumed that the profit of sub-contractors in all the cases was 5%. The Arbitrators thus decided the amount of increased wages on assumption and not on the proof of actual payments as directed by this Court in the earlier order."

The learned counsel for the appellant did not dispute that the question referred to the arbitrators consisted of two parts : one of liability and the other of quantum; but it was argued that in the earlier Award, it was implicit that the liability part was decided against the State and thereafter, it was held liable for payment of Rs. 235.00 lakhs to the contractor. While remitting the Award for re-quantification, the District Judge specifically observed that the whole Award was not required to set aside. This signified that the liability part of the question answered by the arbitrator by necessary implication was not disturbed by the District Judge and the finding became final, as no appeal against that part of the remand order upholding the said finding was preferred by the State, though such an appeal u/s 39 of the Act was competent in view of the two decisions of this Court in *The Chief Administrator, Dandakaranya Project, Koraput, Orissa and Another Vs. Prabartak Commercial Corporation Ltd., and Jayantilal v. Surendra* AIR 1956 Nag. 245. Accordingly it was urged that it was not open to the State to raise any question as to its liability for reimbursement in proceedings for setting aside the subsequent Award, or for the Court to reconsider the question. It was also pointed out that the arbitrators were not bound to discuss evidence or to disclose reasons for the conclusions reached. A number of decisions were cited in support of the contention, which will be dealt with at appropriate places. It was further argued that as the muster rolls were not available with the sub-contractors, they could not be produced before the arbitrators, but it was proved that the appellant had paid to the sub-contractors money for payment of increased wages to the workers and it was not disputed-even by the State that there was an average of 35% increase in the wages and, therefore, the arbitrators could not be said to have misconducted the proceeding by relying on these facts and making an award against the State. The award was further sought to be justified on the ground that 3 other similar contractors were made payments for escalation in wages. For all these reasons, it was contended that the learned District Judge committed an error in setting aside the Award.

The learned Advocate General appearing for the State referred to two stages of the legal proceedings before the Court : one before the order of remand and the other subsequent to the order of remand. It was argued that from the very inception, it was known to the contractor that the State was denying its liability under the contract for reimbursement of the increase in wages. It was the reason why in its application u/s 20 of the Act, it had alleged that its claim was rejected by the Superintending Engineer and in paragraph 12 of its claim statement, it was asserted that "in terms of the contract, it is entitled to be reimbursed the additional expenditure it has incurred on account of the revision of the fair wages by the Respondent." The main question, therefore, was about the State liability

for reimbursement, which was required to be decided by the arbitrators, but they failed to consider the question or to refer the relevant clauses of the contract in this regard and made an Award for payment of Rs. 236.00 lakhs, assuming that the State was liable to pay the amount. The Award was challenged and it was specifically urged that the first and foremost question "whether the State of M. P. is liable to reimburse the claim, due to escalation of wages as a result of increase of wages under the Payment of Wages Act, has not been decided"; but the Court also failed to decide the question and remanded the Award for reconsideration. It was argued that although the operative part of the remand order recited that the whole Award was not required to be set aside, in effect it was set aside in its entirety and the whole dispute was open for reconsideration before the arbitrators. The point was, therefore, again urged in writing before the arbitrators, but they again failed to decide the question and made a fresh Award for payment of Rs. 236.00 lakhs. In so doing, they further misdirected themselves by basing their conclusions on conjecture, instead of basing them on actual payments made to the workers as per directions made in the remand order. It was submitted that no appeal was competent against the remand order, as there was no refusal to set aside the Award on any such ground as was urged on behalf of the appellant. The Award could, therefore, be challenged and set aside on the ground that the arbitrators failed to decide the basic question of liability. He also cited several authorities in support of his contentions. They will be looked into at proper places.

It was fairly not disputed by the learned counsel for the appellant that though the question referred to the arbitrators was one, it consisted of two parts : liability and quantum. Liability part of the question was not specifically decided by the arbitrators in either their Awards. It, therefore, follows that the quantification was made either on the basis that there was no dispute between the parties so far as the State liability for reimbursement was concerned, or after holding by necessary implication that under the contract, the State was liable for reimbursement. Both the Awards are silent and give no indication as to which course was followed. As the Superintending Engineer was specific in saying : "As there is no escalation clause in the contract agreement for the work awarded to the contractor, the claim is rejected," in his letter dated 16-4-1984 communicated to the contractor, and as the back bone of the letter's claim was that "in terms of the contract, it is entitled to be reimbursed the additional expenditure it has incurred on account of the revision of the fair wages" by the State; or that "in any event a term as above has to be necessarily implied to give true meaning and effect to the bargain between the parties" (see paragraphs 12 and 14 of the Claim Statement), the arbitrators ought to have realised the importance of the basic and primary question or dispute between the parties as to the State liability for reimbursement under the contract and given a specific finding in that regard after considering the contract and the materials brought on record. This having not been done must necessarily result in recording a finding that the arbitrators proceeded on the wrong premises that there was no dispute

between the parties as to the State liability for reimbursement and thereby misconducted the proceedings. There appears no substance in the argument that the arbitrators must be deemed to have decided the question against the State, because they could not be said to have remained unconscious of the main dispute between the parties in the light of the question referred, the allegations made in the Claim Statement and the objections raised in the counter filed by the State. The reason is that there is nothing in either of the impugned Awards to indicate that the arbitrators applied their minds to the relevant provisions in the tender notice or those in the contract between the parties for drawing up an inference of the like suggested by the learned counsel for the appellant. The arbitrators might not have recorded their reasons, but they ought to have given their finding in specific words so far as the primary question of liability was concerned. Such finding cannot be inferred on the reasoning that unless the State was held liable, no quantification of liability could have been made, because such quantification was possible even on the assumption that there was no dispute as to the State liability for reimbursement, but the only dispute was with reference to the actual amount payable by the State. It has been stated in Halsbary's Law of England : "The Award must determine all the difference which the parties by their agreement referred to arbitration" and "in Award which does not decide the differences referred to arbitration is bad and unenforceable." (See para 610, page 322, Volume 2, 4th Edn.). In the present case, we find that the arbitrators did not decide the main difference between the parties about the State liability for reimbursement and, therefore, the Awards made by them were bad and unenforceable.

There can be no dispute that the liability part of the question was question of law and the quantum part thereof was a question of fact. There also appears no difficulty in accepting the argument of the learned counsel for the appellant that an error of law not apparent on the face of the Award, or an error of construction of agreement, or an error in arriving at a conclusion cannot be a ground to challenge an Award. It is, therefore, not necessary to discuss at length the decisions in Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., , U.P. Hotels and Others Vs. U.P. State Electricity Board, . Kapoor Nilokheri Co-op. Dairy Farm Society Ltd. Vs. Union of India (UOI) and Others, , Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, , Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI), New Delhi, Similarly there is no controversy to the proposition that once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the Court to enter into the merits of the dispute, as held by the Supreme Court in A.M. Mair and Co. Vs. Gordhandass Sagarmull, . The difficulty arises because there is not an iota of circumstance to indicate that the arbitrators were alive to the question of liability while making the Awards. To meet this deficiency, an argument was made that a presumption necessarily arises that the arbitrators had considered and disposed of every claim made and defence raised. It was argued that the arbitrators were not bound to give a separate award for each claim. Shivalal

Prasad Vs. Union of India (UOI), was cited as an authority to support the contention, but that case is hardly of any help to the appellant. While considering a consolidated award in respect of several items of claims in that case, it was held that unless the reference specifically required itemwise Award, the arbitrators were not bound to deal with each claim separately. Similar view was taken in Smt. Santa Sila Devi and Another Vs. Dhirendra Nath Sen and Others, . Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, and Moolchand and Others Vs. Kashiprasad Shukla, In the present case, there was one claim, but two questions ; one of law and one of fact. By stretch of any imagination, the two questions could not be said to have been answered just by quantifying the liability or by answering the question of fact alone. It was aptly said by the Supreme Court in Simla Sila (ibid) that a Court should approach an Award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal. Besides it is obvious that unless the reference to arbitration specifically so requires, the arbitrator is not bound to deal with each claim or matter separately, but can deliver a consolidated Award; and unless the contrary appears, the Court will presume that the Award disposes finally of all the matters in difference. It also said : "Where the award is made premises (i. e., of and concerning all the matters in dispute referred to the arbitrator), the presumption is, that the arbitrator intended to dispose finally of all the matters in difference; and his Award will be held final if by any intendment it can be made so. "Applying these tests, if we look to the impugned Award, it would appear that there is absolutely no reasonable basis to support them. The claim was one but the questions were two and, therefore, no presumption arises that the Awards finally disposed of both the questions of law and fact by answering the question of fact alone. As the Award did not expressly dispose of both the questions referred to the arbitrators and as there was absolutely no indication in the Awards or in the proceedings recorded by the arbitrators that the question of law was given any consideration, the impugned Awards could not be said to have disposed of finally all the differences between the parties. In other words, the basic and moot question of liability deep rooted in the terms of the contract could not be said to have been decided against the State, because the impugned Awards maintained silence in that regard. \n Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, while affirming the judgment of the High Court reported in 1986 J LJ 209, the Supreme Court held that the "arbitrator in that case misconducted himself in allowing claim without deciding the objection of the State, which was more or less similar to the one raised in the present ease. We, therefore, see no reason to hold that the arbitrators in the present case did not misconduct themselves in allowing the claim without deciding the basic question of liability raised by the State.

The learned District Judge has observed, "Normally, when an Award is remitted for reconsideration, ans(sic)a fresh Award is made, the parties can raise all objections regarding the validity of the entire award." But the argument was that the whole Award was not set aside while remitting it for reconsideration. The

remand was for re-quantification of the liability after setting aside the Award only to that extent. It was, therefore, implicit that the Court refused to set aside the Award on the ground of failure of arbitrators to decide the question of liability in express words. As no appeal was preferred against this part of the remand order, the liability part of the question attained finality and become immune from further challenge. In support of the contention that the appeal was competent, the two decisions of this Court in Dandakaranya Project and Jayantilal (supra) were cited. The contention deserves to be rejected. The Court did not consider, or refer to the question of liability in its remand order dated 6-3-1987, although the ground was taken in the application u/s 30 of the Act by saying : "Whether, the State of M. P. is liable to reimburse the claim, due to escalation of wages as a result of increase of wages under the Payment of wages Act, has not been decided." The Court considered the earlier Award only in the light of two objections :

- (i) That the arbitrators misconducted the proceedings by not deciding the claim on the basis of actual payments made to the labourers and in deciding it on the basis of payment made to pieceworkers or sub-contractors on task basis.
- (ii) And that the arbitrators "Went beyond the reference in awarding interest when no claim was made in this regard and no reference was made."

The first objection prevailed, but the second objection did not prevail and was rejected by observing that : "There was no objection before the arbitrators on the claim for interest. On the basis of analogy of Section 34 of C.P.C. and by virtue of provisions of Interest Act, the arbitrators have jurisdiction to grant interest." In this context it appears that in the operative part of the remand order, the Court mentioned that "the whole award is not required to be set aside", It would, thus, appear that the Court did not refuse, either expressly or by any implication, to set aside the award on the ground of failure of arbitrators to decide the question of liability. The State could not have, therefore, preferred any appeal against the remand order, if it was not aggrieved by the interest part of the order and accordingly, it was open to it to question its liability under the contract for reimbursement of the contractor's claim based on increase in wages in subsequent proceedings after the remand. In the light of these facts, it is not necessary to look into the decisions cited by the learned counsel for the appellant about the competency of appeal. Similarly it is not necessary to see the decision of the Supreme Court in Raipur Dev. A. v. M/s Chokhanmal Cont. 1989 MPJR (SC) 584, where in it is said that : "The ground arising out of an error of law apparent on the face of the Award prima facie appears to fall either u/s 16 (1) (c) of the Act, which empowers the Court to remit the Award to the arbitrator where an objection to the legality of the Award which is apparent upon the face of it is successfully taken, or u/s 30 (c) of the Act which empowers the Court to set aside an Award if it is "otherwise invalid". "The reason is that the Court did not consider the earlier Award in the light of the legal infirmity in it due to the arbitrators, omission to consider and decide the question of liability and,

therefore, even if it could remand the case of set aside the Award on that ground, it did not do so, because the point was not considered and the Award was set aside on another ground.

The learned counsel for the appellant was right in contending that the arbitrators were not bound to discuss evidence or to disclose reasons for the conclusions reached; but not right in submitting that the absence of finding that the State was liable, was nothing but reason and, therefore, not necessary to be discussed. As earlier pointed out, the liability part of the question was a vital and most substantial point in controversy between the parties, which should not have been left undecided by the arbitrators and if they did so, their Award was liable to be set aside on the ground of misconducting the proceedings,

In the remand order dated 6-5-1987, there was a clear finding that:

.....by employing a sub-contractor or a petty contractor, the contracting contractor is not absolved from the liability of making payment of wages as per the rules. In this situation, the amount regarding the difference in wages has to be calculated on actual basis and not otherwise unless the parties agree upon some other formula for calculation. In this case, it does not appear that both the parties had expressed their agreement to calculate the amount on the basis of assumed labour component of 35% of the value of the work done during the relevant period.

This finding was recorded after considering the grievance of the State Government that the arbitrators :

.....did not collect the actual figures showing the amounts paid by the respondent to the labourers in the execution of the, work during the period of each escalation They misdirected the proceedings by allowing the contractor to show payments made to the task workers or sub-contractors. They did not decide the claim on the basis of the actual payments made to the labourers and decided it on the basis of payments made to piece -workers or subcontractors on task basis. Thus the learned arbitrators have made the Award on a totally different basis against the agreement. They determined the escalation assuming labour component at 35% of the value of work done during the period of escalation.

and after considering the reply of the contractor that;

.....The respondent (claimant) cannot be expected to maintain muster rolls for the labourers engaged through piece-workers and sub-contractors. The petitioner made no grievance during the proceedings. In a number of cases, the respondent itself has made payments on the basis of 35% as labour component and the Award cannot be challenged on that ground.

The arbitrators were, therefore, bound to make quantification of the liability on the basis of actual payments made to the labourers by the contractor or by sub-contractors in accordances with specific directions made in the remand order.

Instead of doing so, the arbitrators again quantified the liability by following the same basis on which the earlier Award was made. In this fashion, by not carrying out the directions of the Court in the matter of quantification of the liability, the arbitrators further misconducted the proceedings before them. The non-availability of evidence about actual payments to the workers was no ground to fall back on the old basis, which was declared to be illegal by the Court in its remand order dated 6-5-1987. The Court below was, therefore, right in holding that the arbitrators further misconducted the proceedings by deciding the quantum of liability in the absence of any evidence about payments made to the labourers.

An attempt was made to justify the impugned Award by filing 3 documents in this Court with an application under Order 41 Rule 27 CPC, showing that in similar circumstances and under identical terms the 3 other contractors, viz., M/s SEW Constructions Pvt. Ltd., M/s Mittal & Company and M/s Progressive Engineering Company were made payments on account of increase in wages during the progress of the works under the contracts. It was urged that one of the three documents filed along with the application under O. 41 R. 27 CPC was before the arbitrators. By citing *The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another*, and *K. Iantan Government v. Duff Development Co.* 1923 AC 395, it was contended that in case the contract was ambiguous in regard to the admissibility of claim made by the contractor, subsequent interpreting statements were admissible and that an arbitrator, in construing a deed, is entitled to have regard to the surrounding circumstances, not only for the purpose of making intelligible the terms of the deed and of applying them to the facts, but also for the purpose of implying in the deed a covenant which is not expressed therein, provided that the implication is not inconsistent with the express terms of the deed. The arbitrators did not say in their impugned Award that because of any ambiguity in the contract, they were holding the State liable for reimbursement on the face of payment towards similar claim of some other contractor and, therefore, no question arises as to justification of the claim on the basis of its merits. As rightly pointed out by the learned District Judge in paragraph 9 of its impugned order that :

.....this Court is not considering the question of payment of escalated wages on merits. It has only to be determined whether the arbitrators who have directed the State to make the payment difference in wages had considered all the relevant documents which were material for rendering a just decision. As said earlier, the material documents of agreement had not been considered by the arbitrators and, therefore, the arbitrators had misconducted the proceedings.

For the foregoing reasons, this appeal has no substance and is hereby dismissed. In the circumstances of the case, we make no order as to costs of this appeal.