

(2003) 02 SHI CK 0001
In the High Court Of Himachal Pradesh
Case No : OMP (M) No. 5 of 2002

State of Himachal Pradesh

APPELLANT

Vs

Amar Nath and Sons

RESPONDENT

Date of Decision : 28-02-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2, 34, 34(2), 34(3), 36

Citation : (2003) 2 ShimLC 99

Hon'ble Judges : Kuldeep Chand Sood, J

Bench : Single Bench

Advocate : P.M. Negi, Assistant Advocate General, for the Appellant; J.S. Bhogal and Suneet Goel, for the Respondent

Final Decision : Allowed

Judgement

Kuldeep Chand Sood, J.—These objections u/s 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the "Act" are laid by the State of Himachal Pradesh through the Executive Engineer, Nalagarh Division of the Himachal Pradesh Public Works Department.

2. It appears the work "Upgradation and Improvement of State Arterial road, i.e., Swarghat Nalagarh Maranwala road Km. 0/0 to 55/700 SH: Correction of existing carriageway 7.00 Mtrs. width including extra admissible width on curves with metal ling and tarring complete, providing mixed seal surfacing in the proposed entire carriageway on 7.00 Mtrs. including extra admissible width pm curves and providing road side drains as per standard design in Km. 31/540 to 39/870" was awarded to Respondent-Contractor Amar Nath and Sons, Dharampur by an agreement between the parties for tendered amount of rupees 1,17,38,077. The stipulated date of commencement of the work was January 24, 1996 and the work was to be completed on or before January 23, 1997. A dispute regarding certain claims arose between the parties, which were referred to the Superintending Engineer, Arbitration, of the Himachal Pradesh Public Works Department at Solan for arbitration in terms of Clause 25 of the agreement. The

arbitrator made his impugned award on March 16, 2001 by allowing certain claims of the Contractor. Dis-satisfied, the State has filed the present objections u/s 34 of the Act.

3. Mr. P.M. Negi, learned Assistant Advocate General, confines his challenge to the impugned award against Item No. 8-A of Claim No. 2 and additional claim regarding the compensation levied against the contractor under Clause 2 of the agreement.

4. The contractor resists the objections raised by the State of Himachal Pradesh. It is submitted that the objection relates to the merit of the dispute between the parties and this Court while exercising jurisdiction u/s 34 of the Act, would not go into the merits.

5. The following issues were settled:

1. Whether the award is not in accordance with the terms and conditions in the contract agreement as alleged? OPP.

2. Whether the award is against the Public Policy? OPP.

3. Relief.

6. Learned Counsel stipulates that parties would lead evidence only by way of affidavits.

7. I heard Mr. P.M. Negi, learned Assistant Advocate General for the Petitioner and Mr. J.S. Bhogal, Senior Advocate assisted by Mr. Sunit Goel learned Counsel for the Respondents and have perused the award.

My findings on the issues are:

Issue Nos. 1 and 2.

8. Both these issues are taken up together as they are inter connected.

9. A perusal of Section 34 of the Act shows that an award can only be set aside if it falls within the mischief of Section 2(a) or 2(b) of Section 54 of the Act which may be reproduced for convenience:

34. Application for setting aside the arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) a party was under some incapacity, or

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected to it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters nor submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(j) the arbitral award is in conflict with the public policy of India.

Explanation.--Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81....

10. So far the objection regarding item No. 8-A of Claim No. 2 is concerned, this pertains to laying of built up spray grout. The claimant in this claim claimed rate of rupees 630.82 paise per 10 sq. mtrs. for built up spray against the rate allowed by the Department at rupees 475 per 10 sq. mtrs. The arbitrator in his award noticed that the State of Himachal Pradesh produced detailed entries of measurements in respect of the groundwork done at site. The claimant demanded a rate of rupees 630 per sq. mtrs. in his claim whereas the claim assessed by the Department was rupees 475. This rate, claimed claimant-contractor, was disputed and that he was assured that he would be given a rate of rupees 604.8 per 10 sq. mtrs. The arbitrator took a view that as the Executive Engineer in charge of the work recommended rate of 604.82 paise per 10 sq. mtrs. to the Competent Authority, therefore, Contractor was entitled to the rate, which was recommended by the Executive Engineer.

11. Mr. Negi learned Assistant Advocate General strenuously urges that the Contractor himself had agreed a rate of rupees 475 per 10 sq. mtrs. for this substituted item and, therefore, the Arbitrator could not have traveled beyond the agreed rate and an award in disregard to the agreed rate would amount to an award against the public policy of India. I was taken through the record by Mr. Negi. Annexure P4 with the affidavit of Executive Engineer, Nalagarh in support of the objections as evidence shows that in response to the letter of the

Contractor dated May 1, 1995 the rate of extra item, i.e., providing and laying built up spray grout for carriage of material was allowed at rupees 475.52 paise per 10 sq. mtrs. by the Executive Engineer, i.e., In charge of the work. This was in reference to the letter of the Contractor regarding the rate for extra item dated May 1, 1995. The contractor agreed to this rate by his letter dated February 10, 1997 Annexure P5 to the affidavit. It refers to the letter of the Executive Engineer dated June 17, 1995. Thus the Contractor himself having agreed to do this extra item at the rate of rupees 475.52 paise per 10 sq. mtr., cannot be permitted to in excess than the agreed rate. The Arbitrator indeed could not have gone beyond this agreed rate for this substituted item. Such an award would be opposed to public policy.

12. The expression "public policy" or "opposed to public policy" is not defined either in the Arbitration Act or the Contract Act, 1872. In my view, the expression "public policy" would connote which concerns the larger public interest or the public good. The Apex Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, observed:

...Public policy, however, is not the policy of a particular Government. It connotes some matter, which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time....

13. It cannot be in the larger public interest to allow a Contractor a rate more than agreed rate between the Contractor and the concerned authority of the Department.

14. The Apex Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, pointed out the arbitrator cannot act arbitrarily and irrationally or independent to the provisions of the contract agreement. The award made by the arbitrator in respect of substituted item under Item No. 8-A of Claim No. 2 is therefore liable to be set aside.

15. The next challenge of Mr. Negi is in respect of the additional claim under Clause 2 of the Contract Agreement. Clause 2 of the contract agreement provides for compensation for the delay in execution of the work. Clause 2 reads:

Clause 2.--The time allowed for carrying out the work as entered in the 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 reckoned from the fifteenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence. The contractor shall pay as compensation an amount equal to one per cent, or such smaller amounts as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the tendered amount of the whole work as shown in the tender, for very day 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 complete one-eights of the whole of the work before one-fourth of the whole time allowed under the contract elapsed, three-eights 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 in a time-schedule has been submitted by the contractor and the same has been accepted by 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 tendered 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 tendered amount of the work as shown in the tender.

(Emphasis supplied)

16. In the present case, the Department levied 10% of tender amount as compensation on the Contractor and rescinded the contract under Clause 3 of the contract agreement on the failure of the contractor to complete the works within the stipulated period. The Arbitrator awarded an amount of rupees 9,36,971. The Arbitrator waived the penalty imposed upon the Contractor by the Engineer-in-charge on the grounds:

(a) the principles of natural justice were violated;

(b) the Superintending Engineer was the competent authority to decide the quantum of compensation to be levied and not the Engineer-in-charge, which was violative of Clause 2 of the agreement.

17. It may be noticed that Clause 25 of the contract agreement provides for settlement of dispute by arbitration. Clause 25 of the contract agreement may be reproduced for convenience:

25. Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works 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 Engineer-in-Chief/Chief Engineer, Himachal Pradesh Public Works Department. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that he 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 of difference. The

arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, to Engineer-in-Chief/Chief Engineer, Himachal Pradesh Public Works Department, at the time of such transfer, vacation of office or inability to act, 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 the predecessor. It is also a term of this contract that no person other than a person appointed by the Engineer-in-charge/Chief Engineer, Himachal Pradesh Works Department should act as arbitrator and, if for any reason, that is not possible, the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50,000.00 (Rupees fifty thousand) and above the arbitrator shall give reasons for the award.

Subject as aforesaid the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings under this clause.

It is also a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.

It is also a term of the contract that if the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Government, that the bill is ready for payments, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Government, shall be discharged and released of all liabilities under the contract in respect of these claims. The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.

18. The Apex Court in Vishwanath Sood Vs. Union of India (UOI) and Another, ruled that Clause 2 of the contract agreement envisages the determination of the amount of compensation for the delay in the execution of the work by the Superintending Engineer which stipulates that decision of the Superintending Engineer in writing shall be final. Construing Clause 25 of the contract agreement, Their Lordships observed that 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 agreed schedule between the parties as clause (2) provides that decision of the Superintending Engineer "shall be final". Therefore the question of awarding compensation under clause-2 is outside the purview of the arbitrator and the compensation which may be 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. Their Lordships held:

...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 averting 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.

(Emphasis given)

19. The award made by the arbitrator in respect of the compensation levied under Clause 2 thus was without jurisdiction as this question was not arbitrable. Needless to say any award made dehors the contract agreement is against the public policy. The award in respect of this claim is liable to be set-aside. Issues are accordingly decided.

20. No other point is urged before me.

21. In result, the objections are partly allowed. The award made in respect of Item No. 8-A under claim No. 2 and additional claim under clause (2) of the Contract Agreement is set aside. The remaining part of the award remains intact and shall be enforceable u/s 36 of the Arbitration Act.

No costs.