

(1977) 09 SHI CK 0010
In the High Court Of Himachal Pradesh
Case No : F.A.O. No"s. 6 and 8 of 1975

Union of India (UOI) and Another

APPELLANT

Vs

Vishwanath Sud and Another

RESPONDENT

Date of Decision : 05-09-1977

Acts Referred:

Arbitration Act, 1940 — Section 29, 30

Citation : AIR 1978 HP 31 : (1977) 6 ILR HP 543

Hon'ble Judges : R.S. Pathak, C.J;T.U. Mehta, J

Bench : Division Bench

Advocate : Advocate General, for the Appellant; Chhabil Dass, for the Respondent

Final Decision : Partly Allowed

Judgement

Pathak, C.J.—This and the connected first appeal are directed against the judgment and order dated Dec. 3, 1974 of our brother Thakur disposing of objections against an arbitration award.

2. The appellant Government entered into a contract dated June 20, 1968 with the respondent, Vishwa Nath Sud, a building contractor for the construction of a Farmers" Community Centre at Thanedhar at a cost of Rs. 2,40,000/-. A dispute having arisen between the parties in regard to the execution of the contract, it was referred to the sole arbitration of the Superintending Engineer, Shri R. K. Sarkar, under Clause 25 of the agreement. The contractor filed a claim for Rs. 1,28,000/- before the Arbitrator, and the Government filed a counter-claim. On March 20, 1972 the Arbitrator made his award. The contractor was awarded Rs. 31,932/- and the Government Rupees 21,504/- on their respective claims.

3. On application by the contractor, the Arbitrator filed his award in Court. The contractor applied under Sections 15 and 16 of the Indian Arbitration Act for a modification of the award in respect of items Nos. 1, 8 and 9 of his claim and item No. 1 of the Government"s counterclaim. The Government filed objections

under Sections 30 and 33 of the Act and prayed that a sum of Rs. 8,080.20 be awarded in its favour or, alternatively, the award be remitted for fresh consideration. A number of issues were framed by the learned single Judge, but only two issues were pressed. They involved the question whether the award of the Arbitrator was liable to be modified or remitted in the light of the objections taken by the parties. The learned single Judge upheld the plea of the contractor that the Arbitrator had no jurisdiction to entertain the claim of the Government that he was liable to pay compensation for the delay in executing the work and, therefore, he set aside the Award in so far as it directed the contractor to pay Rs. 20,000/- on this account to the Government. All other pleas raised respectively by the parties were rejected.

4. The Government has now filed First Appeal from Order No. 6 of 1975, while the contractor has filed First Appeal from Order No. 8 of 1975.

5. In the appeal filed by the Government, the principal contention is that the learned single Judge erred in holding that the Arbitrator acted outside his powers in awarding the sum of Rs. 20,000/- to the Government against the contractor on account of delay in execution of the work. The learned single Judge has held that the claim falls within the scope of Clause 2 of the agreement which, in his view, places the matter exclusively within the jurisdiction of the Superintending Engineer, and consequently excludes it from the domain of the Arbitrator. The contention of the learned Advocate-General is that the determination of compensation under Clause 2 is administrative in nature, and is open to judicial enquiry before an arbitrator under Clause 25. Alternatively, if the determination under Clause 2 is conclusive and is not amenable to arbitral scrutiny under Clause 25, he urges that there was no Superintending Engineer on the date when the dispute arose and therefore there was no possibility of any decision under Clause 2, and that being so the provision for arbitration under Clause 25 was not excluded.

6. It is necessary to set forth the two clauses of the agreement. Clause 2 provides :

"Clause 2 : Compensation for delay. 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 be reckoned from the 15th 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 and the contractor shall pay as compensation an amount equal to 1%, 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 as shown in the tender, for every day that the work remains uncommenced, or unfinished, after the proper dates....."

7. Clause (25) declares : "Clause (25) :--Settlement of disputes by Arbitration.

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 of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising Out of or relating to the contract, designs, drawings, specifications, estimates, instruction, orders, or these conditions Or otherwise concerning the works or the execution or failure to execute the same Whether arising during the progresss 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. 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 or difference. The arbitrator unto whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Chief Engineer, Himachal Pradesh Public Works Department at the tune 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 his predecessor. It is also a term of this contract that no person other than a person appointed by the Chief Engineer, Himachal Pradesh Public 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. 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 proceeding under this clause."

8. According to Clause 2, the time allowed for executing the work is deemed to be of the essence of the contract on the part of the contractor. The work is required to proceed with all due diligence throughout the stipulated period of the contract and in the event of the work not being commenced on the due date or being left unfinished on the appointed date "the contractor shall pay as compensation an amount equal to 1% 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 as shown in the tender, for every day that the work remains uncommenced, or unfinished, after the proper dates". It is apparent that in the ordinary course, the rate of compensation payable by the contractor is 1% of the amount of the estimated cost of the whole work. But a departure from this course is envisaged if the Superintending Engineer considers it a case for determining the compensation at a smaller amount. The consideration mav turn on extenuating circumstances in favour of the contractor.

9. The question is whether the compensation determined under Clause 2 is excluded from the scope of arbitration under Clause 25. The sine qua non for the

application of Clause 2 is that the contractor should have been guilty of delay in commencing the work or in completing it. A reading of Clause 2 indicates that neither the authority, nor the procedure, is prescribed for determining whether the contractor is responsible for the default. Evidently, the matter has been left to administrative action. An officer of the Department will make this determination in the course of an administrative proceeding. Having reached the conclusion that the contractor is responsible, if the officer is other than a Superintending Engineer he is bound to compute the compensation at the stipulated rate of 1%. If there is reason to believe that extenuating factors exist in favour of the contractor justifying a lower compensation, it is the Superintending Engineer alone who can decide on a smaller amount of compensation. The decision of the Superintending Engineer is intended to be final.

10. Now, whether the contractor is responsible for the delay is a matter which can raise serious dispute in a particular case. That dispute will arise after the contractor has been informed that he is liable to pay compensation determined under Clause 2. There is nothing in Clause 2 itself which points necessarily to the participation of the contractor in the proceeding under Clause 2. Clause 2 contemplates a wholly administrative proceeding, in which no prior notice to the contractor is envisaged before the compensation is determined. Nonetheless, after the determination is effected and the liability is communicated to the contractor he may question the liability. It is open to him to say that he is not responsible for the delay. There may be several reasons where a delay may be occasioned without the contractor being responsible for it. Vis maior, and not the negligence of the contractor, may have brought about the delay. There may be circumstances which no human foresight could provide against, and of which human prudence is not bound to recognise the possibility. Another instance may lie in the omission of the Government to fulfil a condition precedent essential to the contractor commencing the work or completing it. If the Government fails to fulfil the condition within reasonable time, no responsibility can be laid at the door of the contractor. There may be other reasons for the delay, which are not related to the contractor.

11. Inasmuch as a bona fide dispute can be raised by the contractor in regard to his liability to compensation under Clause 2 and as no machinery is provided in Clause 2 for the resolution of that dispute, there is ample justification for holding that resort can be had to arbitration under Clause 25. The arbitration of such a dispute is intended under Clause 25. No arbitration is contemplated under Clause 2. For that reason, the reliance placed by learned counsel for the contractor on *The Great American Insurance Co. Ltd. Vs. Bodh Raj*, and *Great American Insurance Co. Ltd. Vs. Dina Nath*, is misconceived. The Arbitrator under Clause 25 has the widest powers in regard to the dispute referred to him. He can decide both whether the contractor has incurred any liability of compensation at all on account of the delay in the commencement of the work or in its completion and also, if such liability is established what should be the quantum of compensation.

12. It is pointed out by learned counsel for the contractor that the decision of the Superintending Engineer under Clause 2 has been made final, and therefore it cannot be the subject of arbitration under Clause 25. The statement in Clause 2 that the decision of the Superintending Engineer is final merely constitutes a declaration that no officer in the Department can disturb the quantification. We have been referred to para. 20 of Vol. II of the C. P. W. D. Manual, and it provides that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. The finality cannot be construed as extending, for the reasons which have prevailed with us to excluding the jurisdiction of the Arbitrator under Clause 25. In *South India Railway Co. Ltd. Vs. S.M. Bhashyam Naidu and Others*, and *Governor-General in Council v. Simla Banking and Industrial Co. Ltd.* New Delhi. AIR 1947 Lah 215 the jurisdiction considered there was in nature arbitral, and consequently the expression "final" was, in each of those two cases, construed accordingly. Nor do we find anything in *Scott v. Avery*, 1843 to 1960 All ER 1 which can be of any assistance to the contractor. We have also been referred to para. 1200 on page 612 and para. 1215 on page 619 of Vol. 4 of Halsbury's Laws of England, and to *Eaglesham v. Momaster*, 1920 All ER Rep 674; *East Ham Borough Council v. Bernard Sunley & Sons Ltd.* (1965) 3 All ER 619 and *M. Kave Ltd. v. Hosier and Bickinson Ltd.* (1972) 1 All ER 121. In our opinion, the material on which learned counsel for the contractor relies is of no relevance. The law stated there relates to the status and consequences of a provision in an agreement between the contractors and the employers providing for a certificate by an Architect. Certification by the Architect was expressly made conclusive between the parties in proceedings between them. No such provision exists in the instant case.

13. It has been vehemently contended by learned counsel for the contractor that Clause 2 of the agreement constitutes the Superintending Engineer as the final authority for determining the compensation in accordance with Section 74 of the Contract Act. Whether or not Clause 2 should be applied in accordance with the principles embodied in Section 74 need not detain us, because we are satisfied that the finality conferred on the quantification of compensation by the Superintending Engineer does not preclude the contractor from raising a dispute and having the matter referred to arbitration under Clause 25.

14. In the circumstances, we find ourselves unable to agree with the learned single Judge that the Arbitrator travel-fed outside his jurisdiction in awarding a sum of Rs. 20,000/- as compensation to the Government against the contractor for the delay in executing the work.

15. We need not, therefore, notice the plea of the learned Advocate General that there was no Superintending Engineer on the date when the dispute arose, and consequently Clause 2 was not available.

16. The next contention of the learned Advocate General is that the award of Rs. 31,932/- made by the Arbitrator in favour of the contractor is invalid. The

submission requires us to consider the merits of the decision of the Arbitrator. It is pointed out that the Arbitrator has awarded various sums to the contractor for work of a description not performed by him. It is said that the Measurement Book contains the work actually done by the contractor, and that what is stated therein is final. We have been taken through a Schedule filed before us detailing the claims made by the Contractor and also indicating the work actually done by him. It is urged that if regard be had to the Measurement Book, nothing was due to the contractor, and on the other hand he was liable to pay Rupees 8,080.20 to the Government. We have carefully considered the matter, and we are unable to see how we can interfere in the exercise of the jurisdiction by which we are bound. The grounds for interfering with an Award are detailed in Section 30 of the Arbitration Act, and we are not satisfied that any provision of that section is attracted. The award made by the Arbitrator is not a speaking award. The face of the Award must show the error, and if it does not, it is not permissible for the Court to go behind the Award. The Court is not entitled to make a roving and sifting investigation of the record and proceedings before the Arbitrator, and constitute itself a regular court of appeal from the Award. The Measurement Book has not been made part of the Award, and at best merely constitutes evidence before the Arbitrator. It cannot be examined for the purpose of discovering an error in the Award. See *Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., and State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd.*, For the same reason, we must reject the contention of the learned Advocate General that the award of Rs. 9,718/- made by the Arbitrator in favour of the contractor on his claim of Rs. 10,110/- for material stacked at the site and taken over by the Government is liable to be set aside. It is pointed out that the claim of Rs. 10,110/- was already accounted for and adjusted in the bill, and that this would be clear from a scrutiny of the Measurement Book. As we have already observed, the Measurement Book is not part of the award. The award does not contain the reasons of the Arbitrator for making it. This contention of the learned Advocate General has therefore no force.

17. First Appeal from Order No. 6 of 1975 can, therefore, be allowed insofar only as the item of Rs. 20,000/- is concerned.

18. In the appeal filed by the contractor, it is urged by learned counsel for the contractor that a sum of Rs. 6,172 should have been awarded to the contractor on account of the balance payment of 15 per cent of the "secured advance of material." It is pointed out that this amount had been detained by the Government as security. It is urged that the claim had been disallowed by the Arbitrator under some misconception, and we are referred to the Measurement Book. This claim has been considered by the Arbitrator and he has not awarded any sum in respect of the claim. Reliance is placed on behalf of the Contractor on *Union of India v. Jai Narain Misra* AIR 1970 SC 753. In that case, the security deposit of Rs. 6,000/- had been returned to the respondent and there was no dispute about it before the Arbitrator. The Supreme Court held that this part of

the award had been made under some misapprehension, and being clearly separable it was liable to, be set aside. In the present case, the claim was the subject of a dispute before the Arbitrator. He applied his mind to it, and rejected the claim. For the same reason for which we have rejected the contention of the learned Advocate General in respect of the award of Rs. 31,932/-and of Rs. 9,718/-, we reject this contention of the contractor.

19. Finally, it is contended by learned counsel for the contractor that the learned single Judge should have allowed interest on the sum awarded in favour of the contractor after setting off the sum awarded in favour of the Government. Reference is made to Section 29 of the Arbitration Act. No ground has been taken by the contractor in his appeal to this effect, but no objection has been taken by the learned Advocate General to the point being taken before us. Section 29 provides that where an award is for the payment of money the court may in the decree order interest, from the date of the decree at such rates as the court deems reasonable, to be paid on the principal sum as adjudged by the award confirmed by the decree. The power is vested in the court and arises by statute. The effect of our judgment disposing of both the appeals is to restore the award of the Arbitrator to the sums awarded by him. On that, it cannot be disputed that after setting off the sum in favour of the Government against the sum awarded in favour of the contractor, the contractor is still entitled to a certain sum against the Government. There is no reason why the contractor should not be entitled to interest on such sum from the date of the decree. We consider interest at 6 per cent on such sum to be reasonable.

20. In the result, both appeals are partly allowed. The judgment and order of the learned single Judge are set aside in so far as the sum of Rs. 20,000/- was deleted thereby from the award of the Arbitrator, the award being now restored to its original terms, and further the contractor is entitled to interest at 6 percent on the sum found due to him after adjusting the sum awarded by the Arbitrator in favour of the Government against the sum awarded in favour of the contractor. In the circumstances there is no order as to costs.