
(2005) 04 AP CK 0066
In the Andhra Pradesh High Court
Case No : C.M.A. No. 3701 of 2002

Union of India (UOI) and Others	Vs	APPELLANT
Satyanarayana Construction Co. and Another		RESPONDENT

Date of Decision : 08-04-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 19(4), 24, 28, 28(1), 31(3)

Citation : (2005) 4 ALD 199 : (2005) 3 ALT 460 : (2005) 2 ARBLR 496

Hon'ble Judges : T. Meena Kumari, J;G. Yethirajulu, J

Bench : Division Bench

Advocate : C.V. Rejeeva Reddy, for C.V. Vinitha Reddy, for the Appellant; A. Ramalingeswar Rao, for the Respondent

Final Decision : Allowed

Judgement

T. Meena Kumari, J.—This CMA is filed questioning the order and decree dated 4-7-2002 passed in OP No. 77 of 2001 by the learned I Addl. Chief Judge, CCC, Secunderabad wherein the OP filed by the appellants herein against the award of the second respondent dated 31-12-2000 has been dismissed confirming the said award.

2. The case of the appellants, as projected in the OP, is as follows:

The appellants called for open tenders for the earth work from Ch.24150 M to Ch.27700 M between Dharur-Rukmapur stations in connection with doubling of tracks between Vikarabad and Tandur Sections and the first respondent submitted his tender for the said offer and the tender was finalized in strict conformity of the guidelines issued. It is stated that the said work has to be completed by 5-5-1997. Accordingly, an agreement was entered into and the parties accepted the same.

3. The nature of the work includes the (SIC) (SIC) works as the variation quantities in the same stretch by the predecessor Contractor M.Y.J. Venkata Rao in the two contracts and that variation in the quantities was occurred due to the

revision of alignment effected for easing as well as elimination of a few curves. As the predecessor of the first respondent had already executed some work by then and his agreement quantities were on the higher side, the agreements were ordered for closure in order to execute the left over quantities at competitive rates through open tenders. It is also stated that the importance for completion of the said work within the stipulated time has been mentioned in para 2.2.1 of the particulars of the work and the first respondent agreed to complete the said work within the stipulated time.

4. Further, the appellants submit that though the first respondent submitted a programme on 28-1-1997, the claimant left huge gap between commitment and performance and the petitioners addressed cautioning the first respondent to enhance in puts so as to complete the work within the time stipulated and the appellants also granted extension of period without penalty in the beginning and later issued a termination notice and revocation and the second extension was given with penalty since the first respondent did not perform to the accepted conditions and thus committed breach and hence the right imposed on the appellants to impose reasonable penalties cannot be taken away from the appellants.

5. The next contention of the appellants before the learned I Addl. Chief Judge, CCC, Secunderabad is that the second respondent-Arbitrator did not follow the procedure and he did not adduce evidence and also did not provide reasonable opportunity to the appellants and that this Court has no right to appoint arbitrator and hence the award of the second respondent is liable to be set aside. As the learned I Addl. Chief Judge passed the judgment confirming the award of the second respondent without taking into consideration of all the aspects that have been raised by the appellants, the judgment in OP is also liable to be set aside.

6. On the other hand, the first respondent filed written statement pleading that the tender notice in respect of present works related to left over works only and as his predecessor-contractor faced very hard and rocky soil during excavation of the earth work and as it was beyond his estimation for which he was not prepared to work at the rates agreed upon. The earth work also included cutting off all types of soils including of disc integrated rock with boulders of any size or continuous rock which required blasting at the site and to blast the rocks, they have to acquire permission from the District Collector, Ranga Reddy District and they could get licence on 14-2-1997. It is also stated that the appellants requested him to take over the stretch from Ch.24150 M to Ch.26040 M which was completed in all respects as per the programme. Due to above circumstances, he could not complete the entire work within the time stipulated and hence requested time up to 4-11-1997 without penalty but the appellants extended time with penalty and hence he requested for waiver of penalty in his letter dated 2-2-1998. The arbitrator passed award by taking into consideration of all the factors, the said award needs no interference and the learned I Addl.

Chief Judge dismissed the OP filed by the appellants by giving due regard to all the factors and hence the CMA is liable to be dismissed.

7. Thus, the main controversy in between the appellants and the first respondent is with regard to grant of claim Nos., 4, 6, 8 and 11 by the second respondent-arbitrator, which are as follows:

----- Claim No. 4 -Additional remuneration
Rs. 61,23,496.00 Claim No. 6 - Amount due on final bill 3,42,039.00 Claim No. 8-
Refund of penalties 1,74,419.00 Claim No. 11-Interest thereon @ 18% p.a.
25,01,983.00 -----

8. Heard the learned counsel for the appellant Mr. C.V. Rajeeva Reddy for Mr. C.V. Vinitha Reddy and the learned counsel for the respondents Mr. A. Ramalingeswara Rao.

9. The main contention of the learned counsel for the appellants is that the second respondent-Arbitrator exceeded his jurisdiction in passing the award under claim Nos. 4, 6, 8 and 11 and acted beyond the scope of the reference and acted contrary to the terms and conditions of the agreement and the said fact has not been taken into consideration by the learned I Addl. Chief Judge. It is also contended that the award of second respondent for claim Nos. 4, 6, 8 and 11 is based on surmises and conjectures and without any basis. The award granted in respect of claim No. 4 by the arbitrator is contrary to the terms of the Clauses 19(1), 39, 43 (1) and 45 (a) of the General Conditions of the Contract and the court below ought to have set aside the award of the second respondent in respect of claim No. 4. It is also contended that in respect of the work in claim No. 4, the earlier contractor quoted Rs. 167/- per cubic metre and after negotiations he agreed to carry the work at the rate of Rs. 110/- per cubic metre and hence awarding Rs. 210/- per cubic metre of earth work is bad in view of the fact that the same is contrary to the terms of the contract. It is also contended that since the first respondent did not dispute the classification of soils recorded by Engineer within seven days of the date of such measurements, he cannot raise a dispute with regard to the classification of soils as per Clause No. 45(a) of the General Conditions of Contract, The second respondent-Arbitrator has not taken the said fact into consideration. It is also contended that the first respondent did not raise any dispute with regard to the execution of the work and hence the arbitrator would not have allowed claim No. 4. Further, the second respondent-arbitrator did not take into consideration of the various documents relied upon by the appellants and therefore the award passed without considering the documents of the appellant by the second respondent would vitiate the entire award.

10. With regard to claim No. 6, it is contended that the amount under the said claim has to be settled at the time of final bill and hence the claim granted in favour of first respondent by the second respondent is liable to be set aside. It is further contended that as per the terms of the contract, the appellants have

power to impose penalty on the first respondent if he failed to complete the work within the stipulated time in view of the fact that for the contract in question, the time is essence and hence the Arbitrator would not have passed award for refund of penalties. With regard to claim No. 11, the arbitrator would not have granted interest in view of the fact that Clauses 16(3) and 64.5 of the General Conditions of the Contract prohibits granting of interest and the learned I Addl. Chief Judge ought to have rejected the said claim.

11. On the other hand, the learned counsel for the respondents supports the award and pleads that the appellants did not make out any grounds, as stipulated u/s 34 of the Arbitration and Conciliation Act, 1996, to interfere with the award of the second respondent, the learned I Addl. Chief Judge has rightly dismissed the appeal and hence this CMA is also liable to be dismissed.

12. Before going into the merits and demerits of the case of each party, it is necessary to have a look at the terms of the agreement entered into by the first respondent with the appellants. As per the said agreement both the parties agreed that the General Conditions of Contract governing the performance of the works covered by this contract are the "General Conditions of Contract" of the Engineering Department of the South Central Railway as amended from time to time. Thus, if there is any dispute with regard to the nature of work or any other issue, which is not specifically mentioned in the agreement, both the parties have to take aid from the General Conditions of the Contract of the Engineering Department of the South Central Railway.

13. It is to be further noticed that with regard to claim No. 4, the relevant provision in the agreement reads as follows:

"Earth work in cutting in all types Of soils including soft disintegrated rock and with boulders of any size or continuous rock with blasting as required at site including side drains, trolley refuges, catch water drains, etc. including excavation sectioning to profile, dressing of slopes surface and leading of cut spoil into spoil dumps or into embankment up to max. lead of 150 metres and all lifts and dressing slopes and surfaces of spoil dumps with all contractor"s tools, plant and Machinery and labour complete as directed by the Engineer."

The rate for the said work was fixed at Rs. 110/- per cubic metre.

14. Thus, the first respondent agreed to carry out the said work at the rate of Rs. 110/- per cubic metre. It is the case of the first respondent that while executing the work, he found very hard and rocky soil during excavation of the earth work and it was beyond his estimation. Moreover, the first respondent did not raise an issue before the appellants at any point of time while carrying out the work mentioned in claim No. 4 that the nature of work is different to that of the one that is mentioned in the tender and hence he has spent huge amount more than the one quoted due to unforeseen circumstances and therefore he is entitled to have the price more than what he quoted since he spent more amount than the one he expected.

15. It is to be noticed that the period of contract has been extended for five times from time to time. The first respondent in his letter for extension of time has only suggested that he could not complete the work within the stipulated time due to delay in getting licence for possession of explosives, due to naxalite problem, due to trucks strike, restrictions on movement of blasting material and instructions from the police authority to stop the blasting etc. At no point of time, he did not mention that due to change of nature of soil from the one notified in the tender, he has spent huge amount for blasting of rocks that were found while carrying out the work and that he has engaged labourers for chiseling the rocks etc. Moreover, he did not give the break up figures for the claim made for claim No. 4. Thus, it has to be held that the first respondent made claim under claim No. 4 without any material or basis. Further, a perusal of the claim statement goes to show that the first respondent did not able to support his claim of Rs. 1,89,99,999/- by any material nor he could able to furnish the details how he arrived at the above figure and the second respondent passed the award on surmises and conjectures without any basis.

16. The observations of the Supreme Court, which are relevant to the facts of this case, in the case of M/s. Sikkim Subba Associates Vs. State of Sikkim, are extracted below:

"The award under challenge stands vitiated on account of several errors of law, apparent on the face of it and such infirmities go to substantiate the claim of the State that the arbitrator not only acted arbitrarily and irrationally on a perverse understanding or misreading of the materials but was also found to have misdirected himself on the vital issues before him so as to render the award to be one in utter disregard of law and the precedents. Xxxx

The award of an arbitrator cannot be opposed to law and what is not permissible in law cannot be granted or even approved by courts merely because it was an arbitrator who granted it..... The arbitrator could not have been oblivious of the fact that it was the defaults, violations and breaches committed by the appellants that necessitated the termination of the contract by the State, left with no other option for it, in law. Xxx

Consequently, we have no hesitation to set aside the award of the arbitrator, as affirmed by the District Judge, insofar as it purports to award damages to the tune of Rs. 37,75,00,000/- in favour of the appellants, as wholly uncalled for and illegal."

17. Further, the Supreme Court in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., it has been held at para 13 as follows:

"The question, therefore, which requires consideration is - Whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties. Under Sub-section 1(a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for

the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be - whether such award could be set aside. Similarly, under Sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside u/s 34."

18. Further, a Division Bench of this Court in the case of Hindustan Shipyard Limited Vs. Essar Oil Limited and Others, (of which one of us, Justice T. Meena Kumari, is a member) after elaborately discussing the various case law of the Supreme Court has held that if an award is passed ignoring very material and relevant documents throwing light on the controversy, it would vitiate the award. The observations made at para 56 are extracted hereunder:

"In this case, no specific procedure has been fixed by the parties. When such procedure is not fixed, the Arbitral Tribunal has to follow the statutory procedure, it means it has to weigh the entire evidence on record properly and that it has to come to just conclusion within the parameters of the dispute. As observed above, the Tribunal has exceeded its jurisdiction by giving a finding that the first respondent cannot sue against the ONGC and such finding in our view is beyond the scope of purview of the reference to the Arbitral Tribunal and hence the award is liable to be set aside. In this case, it has to be held that there is no waiver of the procedure by the parties. A plain reading of the agreement goes to show that there is no waiver of the procedure by the parties and in the absence of such agreement with regard to the procedure, the arbitrary tribunal is bound to follow the procedure as contained u/s 19(4) of the Act and they have the duty to determine the admissibility and weight of evidence of the documents filed by both the parties. But, however, they have not considered the material documents filed before them which is evident from a reading of the Award itself as nothing is mentioned about the contents or relevance of the documents even though number of documents have been filed before them."

19. Further, the Supreme Court has reiterated the above view that an award, ignoring very material and relevant documents throwing light on the controversy

to have a just and fair decision would vitiate the Award as it amounts to misconduct on the part of the Arbitrator in the case of Sathyanarayana Brothers (P) Ltd. v. Tamil Nadu W.S. and D. Board 2004 (1) A.L.R. 1.

20. In this case, as observed above, in spite of the appellants filing number of documents in support of its cause, none of the documents have been considered by the second respondent. Further, it is pertinent to note that as per Clause No. 19(1) of the General Conditions of Contract, the contractor has to inspect the site and ascertain the nature of work as that of the description given in the schedule of items before quoting his rate. Therefore, the contention of the learned counsel for the first respondent that while excavating the land, he found very hard and rocky soil and as he spent huge amount due to such unforeseen circumstances, the first respondent is entitled to have more price than the quoted one has no legs to stand in view of the fact that it is stipulated in the tender notification that he who quotes for the work has to inspect the site, ascertain the nature of work as to that of the description given in the schedule of items before quoting his rate. Therefore, the first respondent is not entitled to the price more than what he quoted pursuant to the tender notification.

21. It is also to be seen that as per Clause No. 45 (a) of the General Conditions of Contract, a tenderer can dispute the classification of soil within seven days. As seen from the material on record, the first respondent never raised any such dispute within the time of seven days and hence the first respondent shall not be permitted to raise any such dispute after lapse of seven days as per conditions of Clause No. 45(a) of the General Conditions of Contract. All these factors have not been taken into consideration by the learned I Addl. Chief Judge, Secunderabad. Moreover, the first respondent did not produce any material in support of his claim that he spent more than Rs. 110/- per cubic metre while carrying out the work mentioned in claim No. 4. Further, Clause 17 (3) of the General Conditions of Contract prohibits grant of compensation or damages. In view of the above circumstances, the relief granted to this claim by the second respondent has to be set aside.

22. With regard to claim No. 8 i.e., refund of Rs. 1,74,419/- penalties recovered, the learned counsel for the appellants submits that the appellants have imposed penalty on the first respondent as he failed to complete the work within the stipulated time of agreement and therefore the appellants imposed penalty in terms of the conditions of the contract agreement.

23. In this connection, it is to be seen that the first respondent has to complete the work by 5-5-1997 and in the contract agreement it has been specifically mentioned that the time is the essence of the contract and that the first respondent has agreed in specific terms that he will complete the work at any cost within the agreement period without fail. Thus, the duty is cast on the first respondent to stick on to the terms of the agreement and he has to complete the work within the time stipulated. In view of the specific undertaking of the first respondent that he will complete the work within the stipulated time of

5-5-1997, the first respondent has to take all necessary steps with regard to obtaining licence for blasting of rocks etc. As seen from the material, the first respondent applied for licence for blasting operation on 6-2-1997 and he got licence on 14-2-1997 i.e., 8 days from the next date of making application. Hence, the contention of the learned counsel for the first respondent that the delay in execution of the work was occurred due to delay in getting licence for blasting the rocks etc. has no legs to stand in view of the fact that he obtained licence within 8 days from the next date of making application for obtaining licence. It is specifically stated by the appellants that though the first respondent submitted programme on 28-1-97 and specific programme had been followed, the claimants left huge gap between commitment and performance and that the appellants brought to the notice of the first respondent about the early sign of failure on 28-2-1997 in their letter No. W/Con/496/2970 dated 28-2-1997 but the first respondent did not take any steps to reply to that letter and therefore this Court has to form an opinion that the claimant had got nothing to say on his performance exhibited by him at the early stage of contract. Had the first respondent taken necessary steps pursuant to the letter of the appellants dated 28-2-1997; he would have completed the work within the time stipulated.

24. Further, it is to be seen that the appellants have granted extension of time without penalty from 6-5-1997 to 5-7-1997 i.e., for a further period of two months upon the circumstances put forth by the first respondent. The reasons for non-completion of work within the time stipulated are that the delay in getting licence for possession of explosives, naxalite problems and instructions from the police authority to stop the blasting, strike by truck owners from 30-3-1997 to 10-4-1997 and restriction on moving blasting material. It is to be seen that the appellants with a view to provide opportunity to the first respondent to enable him to complete the work, granted two months time i.e., from 6-5-1997 to 5-7-1997 without imposing penalty. In spite of granting time till 5-7-1997, the first respondent did not complete the work and ultimately, the first respondent was granted another four extensions of time by imposing penalty. All these things would go to show that the appellants have cautioned him at the beginning of the commencement of the work that the time is essence of the contract and that they have extended time till 5-7-1997 without penalty. As the first respondent failed to complete the work, penalty was imposed against him only in terms of agreement of contract. Further, the appellants did not impose penalty, while extending time due to some variance in the nature of work. All these factors would go to show that the appellants have taken note of the difficulties that have been encountered by the first respondent while imposing penalty. Since the first respondent did not complete the work within the time agreed upon by him and in terms of the conditions of the contract, the appellants imposed fine amount and hence the same cannot be directed to be refunded to the first respondent.

25. With regard to claim No. 11 i.e., granting of interest, it is to be seen that Clauses 16(3) and 64.5 of the General Conditions of the Contract prohibits

granting of interest. Since claims Nos. 4 and 8 have been rejected by this Court in earlier paras, the question of granting interest to the first respondent does not arise and hence he is not entitled for the same.

26. For claim No. 6, the second respondent has granted a sum of Rs. 3,42,039/-. The said amount has to be calculated at the time of settling the final bill and hence the appellants have to calculate the final bill and pay the amount, if not already paid, to the first respondent within a four weeks from the date of receipt of a copy of this order with interest at the rate of 12% per annum from the due date of payment of the said amount.

27. For the foregoing discussion, the award of the second respondent-arbitrator, as affirmed by the I Addl. District Judge, Secunderabad in his judgment in OP No. 77 of 2001 dated 4-7-2002 is set aside and accordingly the CMA is allowed. No costs.