

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. 355/2004

% Reserved on : July 21, 2008
Pronounced on : 13th August , 2008
UNION OF INDIA ... Petitioner
Through : Ms. Raman Oberoi, Advocate
Vs.
M/S. BAHL BUILDERS (P) LTD Respondents
Through : Mr. Sandeep Sharma, Advocate

CORAM

Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment.? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

% 13.08.2008

Mr. Justice S. Ravindra Bhat :

1. The petitioner, Union of India, challenges an Award of the sole Arbitrator dated 24th April, 2003 whereby the claim was allowed to the extent of Rs. 2,30,000/-, in favour of the respondent (hereafter called “the Contractor”) with interest at 15% per annum.

2. The contractor had successfully bid for completing works tendered for by the petitioner. The tender was accepted on 29th March, 1996. The petitioner entered into a lump sum contract. According to the contract, the period of completion, for the two phases was 8 months for the first phase, and 15 months for the second phase. The total amount of the contract was Rs. 9,06,33,157.58. It is not in dispute that the time for completion was extended to 13th September, 1997 for Phase-II.

3. The contractor respondent raised disputes for compensation, on account of the alleged extra expenditure involved due to delay in completion. He claimed Rs. 6 lakhs.

4. The dispute was referred to the Arbitrator, one Brig. R.B. Singh, sole Arbitrator. In the course of the proceedings, the petitioner contended that a subject matter of the claim i.e. compensation for extra expenditure was an "excepted" matter; besides it was also contended that at the time of extension, the petitioner had made it clear that no compensation would be granted.

5. The Arbitrator overruled the petitioner's objections and held that the dispute was arbitrable and partly sustained the claim awarding Rs. 2,30,000/- to the contractor. The relevant part of the discussion, in support of the findings are as follows:

"28. The arguments and counter arguments in respect to these matters continued and after examining the condition as insisted upon by the Union of India I gave my opinion that the arbitrator has the jurisdiction to decide the claims of the contractor as all these claims do not fall under the purview of condition 11. When U.O.I. Emphatically denied that the claims made by the claimant is not referable to arbitration, the contractor contended that the same has already been referred to the Arbitrator by the Hon'ble High Court vide order dt. 08 July, 2002.

29. I have gone through the statement of claims, pleading in defence and the arguments of both the parties including the Judgments cited above and find that Judgments as quoted by the contractor relate to condition-11 where Hon'ble Supreme Court has upheld the award of the arbitrators in respect of the delayed performance of obligations by U.O.I. And I find that the U.O.I. Affected the smooth working of contract agreement. The U.O.I. Appears to have done no pre-tender planning and therefore they failed to hand over the sites in time and could avoid hindrances in the smooth completion of the work. The contractor carried out the work efficiently and tried their best to mitigate the time loss and in the process they suffered loss by putting in additional work force, additional investment and keeping the shuttering and T&P at the site for a longer period than was actually required. These could be utilised on other works if the contractor were allowed to complete the work as per the original tender conditions. The prolongation of work on account of non-handing over of the site is not covered under condition 11 and payment on this account is justified. The application of condition 11 to avoid reimbursement of loss suffered by contractor is misuse of contractual clause. The escalation paid during the extended period is only in respect of wages of labour/materials tools and plants. The contractor is therefore entitled to be reimbursed the losses suffered on account of wages paid to the staff for the extended period of completion and also loss suffered due to idle shuttering, tool and plants and pumps etc.

30. The claim is partly sustained and I award a sum of Rs. 2,30,000/- in favour of contractor and direct that Union of India represented by Chief Engineer Delhi Zone, Delhi Cantt. Shall pay a sum of Rs. 2,30,000/- to M/s. Bahl builders, DD-1, Kalkaji Extension, New Delhi-110019 against their Claim No.1."

6. The petitioner, relying on Clause 70 which is the arbitration clause, contended that this condition was subject to Clause 11 which had set out in detail what were matters excepted from the purview of arbitration. A conjoint and proper reading of the two stipulations clarified that the dispute for compensation during the extended period could not have been adjudicated by the Arbitrator. Ms. Oberoi, learned counsel relied upon a letter dated 12.8.1997 where, the petitioner while granting extension and indicating it to the contractor stated as follows:

"4. FINANCIAL EFFECT : NIL

Note: 'NILL' financial effect of extension of time DO is with reference to condition 11(c) of IAF-2249."

7. Learned counsel submitted that the decision of the Supreme Court in *Ramnath International Construction Pvt. Ltd. vs. Union of India and Anr.*, 2007(2) SCC 453, is a clear case where clause 11(c), in *para meteria* and identical to the clause in dispute in this case was so interpreted and held to embody a non-arbitrable dispute. Counsel contended, therefore, that the award was unsustainable since the arbitrator lacked jurisdiction. Such being the case, the finding and the award were contrary to the contract, and, therefore, liable to be set aside under Section 34. Learned counsel also relied upon the judgment of the Supreme Court reported as *Vishwanath Sood Vs. Union of India and Anr.*, AIR 1989 SC 952 and a judgment reported as *Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises and Anr.*, (1999) 9 SCC 283.

8. Mr. Sandeep Sharma, learned counsel contends that the findings of the Arbitrator on the issue of his competence to adjudicate on the dispute are in accord with law. He submitted that the decision of the Supreme Court in *Shyma Charan Agarwala and Sons vs. Union of India*, 1999 (1) Arb.L.R 699 which followed the decision in *K.R. Raveendranathan vs. State of Kerla & Anr.*, 1996(10) SCC 35, in this regard is conclusive that despite existence of Clause 11(C), the claim of the contractor would have been examined. Learned counsel also placed reliance upon the judgment of this Court dated 17.1.2008, in *M/s. Paragon Constructions (India) Pvt. Ltd. vs. Union of India and Anr.* (OMP 385/2007).

9. Mr. Sharma submitted that the decision in *Ramnath International Construction (supra)* by a Bench of two Judges whereas the ruling in *K.R. Raveendranathan* was by a Bench of three Hon'ble Judges. The Supreme Court had applied the *K.R. Raveendranathan* and *Shyman Charan Agarwala and Sons* therefore that the view it was submitted should prevail. Learned counsel also contended that the judgment in *Ramnath International* had only relied on previous ruling of the Supreme Court unrelated to the issues such as *Ch. Ramalinga Reddy vs. Superintending Engineer and Anr.*, (1999) 9 SCC 610.

10. Learned counsel contended that on the merits the Arbitrator acted within jurisdiction in awarding the compensation as he did for the extended period and that such determination does not fall within the parameters of permissible judicial intervention under Section 34 of the Act. He placed reliance on the judgment of the Supreme Court reported as *K.N. Sathyapalan (dead) by Lrs. vs. State of Kerala and Anr.*, 2006(4) Arb. LR 275 (SC).

11. For a better appreciation of the controversy concerning arbitrability, it would be necessary to notice that all disputes between parties are subject to arbitration, under Clause 70, which reads as follows:

“70. Arbitration. – All disputes, between the parties to the Contract (other than those for which the decision of the C.W. E. or any other person is by the Contract expressed to be final and binding), shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an [Serving Officer having degree in Engineering or equivalent or having passed final/direct final Examination of Sub- Division II of Institution of Surveyor (India) recognized by the Govt. of India] to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or

termination or determination of the Contract under Condition Nos. 55, 56 and 57 thereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 thereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceedings hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statemtn of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, exparte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and publishing the award.

Clause 11 which deals with time, delay and extension also incorporates the subject matter which cannot be arbitrated. This clause in its entirety, is extracted below:

"11. Time, Delay and Extension-

(A) Time is of the essence of the Contract and is specified in the contract documents or in each individual Works Order.

As soon as possible after Contract is let or any substantial Works Order is placed and before Work under it is begun, the G.E. And the Contractor shall agree upon a Time and Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof and/or the Contract or Works Order as a whole. It shall indicate the forecast of the dates for commencement and completion of the various trade processes or sections of the work, and shall be amended as may be required by agreement between the G.E. And the Contractor within the limitation of time imposed in the contract documents or

Works Order. If the Works be delayed:-

- i. by force majeure, or*
- ii. by reason of abnormally bad weather, or*
- iii. by reason of serious loss or damage by fire, or*
- iv. by reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the trades employed on the work, or*
- v. by reason of delay on part of nominated sub-contractors, or nominated suppliers which the Contractor has, in the opinion of G.E., taken all practicable steps to avoid, or reduce, or*
- vi. by reason of delay on the part of Contractors or tradesmen engaged by Government in executing works not forming part of the contract, or*
- vii. by reason of any other cause, which in the absolute discretion of the Accepting Officer hereinafter mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of Works for which separate periods of completion are mentioned in the contract documents or Works Order, as applicable.*

Upon the happening of any such event causing delay, the Contractor shall immediately, but not later than 30 days of the happening of the event, give notice thereof in writing to the G.E. But shall nevertheless use constantly his best endeavour to prevent or make good the delay and shall do all that may reasonably be required to the satisfaction of G.E. To proceed with the works. Extension of time shall be granted as under:-

(a) by G.E. For all Term Contracts;

(b) by Accepting Officer of the contract for all other Contracts.

In case the Contractor fails to notify the G.E. Of happening of an event(s) causing delay within the period of 30 days stipulated in sub-para 3 above, he shall forfeit his right to claim extension of time for the delay caused due to such event(s).

Extension of time, as granted above, shall be communicated to the Contractor by G.E. In writing and shall be final and binding. PROVIDED THAT in the case of contracts (other than Term Contracts) accepted by the G.E., in the event of the Contractor not agreeing to the extension granted by the G.E., the matter shall be referred to the C.W.E. Whose decision shall be final and binding.

(B) If the Works be delayed:

(a) by reason of non-availability stores shown in Schedule 'B'; or

(b) by reason of non-availability or breakdown of Govt. Tools and Plant listed in Schedule 'C';

then, in any such event, notwithstanding the provisions hereinbefore contained, the Accepting Officer may in his discretion grant such extension of time as may appear reasonable to him and the same shall be communicated to the Contractor by the G.E. In writing. The decision so communicated shall be final and binding and the Contractor shall be bound to complete the works within such extended time.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of

extensions granted under Conditions (A) and (B) above shall be admitted.”

12. In *Ramnath International*, the Supreme Court had to deal with Clause 11-C, which is in identical terms, as in this case. The court, repelling the challenge to the High Court’s finding about lack of jurisdiction of the arbitrator, held that:

“As rightly held by the High Court, which decision we have affirmed while considering Question (i), clause 11(C) of the General Conditions of Contract is a clear bar to any claim for compensation for delays, in respect of which extensions have been sought and obtained. Clause 11(C) amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of his claims for delay and not claim any compensation. In view of the clear bar against award of damages on account of delay, the arbitrator clearly exceeded his jurisdiction, in awarding damages, ignoring clause 11(C). In Associated Engg. Co.¹ this Court held: (SCC pp. 103 & 105, paras 24, 26 & 28)

“24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. ...

** * **

26. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside. ...

** * **

28. In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of the provisions of the contract to the contrary.”

13. The contractor relied upon the decision in *Shyama Charan Agarwal*, to say that an

the High Court's judgment, in respect of an award, of a seemingly excepted matter, which had been set aside, was reversed by the Supreme Court. The two member Bench of the Supreme Court had held as follows:

"1. Special leave granted.

2. In view of the decision of this court in K. R. Ravindran v. State of Kerala (1996(10) SCC 35), the appeal is allowed and the impugned judgment and order of the High Court is set aside. There will be, therefore, a decree also in respect of Claim No. 8 of the Award."

The decision in *K.R. Raveendranathan* was upon a reference to a three member bench about whether there was conflicting reasoning in two earlier judgments, on the question of scope of arbitration, and the jurisdiction of the court to discern misconduct in awards. The Supreme Court answered the reference in the following manner:

"ORDER

1. Special leave granted.

2. The learned counsel for the appellant points out that the question in issue in the present appeals is squarely covered by the decision of this Court in Hindustan Construction Co. Ltd. v. State of J&K ((1992) 4 SCC 17). In particular, it drew our attention to para 10 of the judgment and the portion extracted from the decision in Sudarsan Trading Co. case (Sudarsan Trading Co. v. Govt. of Kerala, (1989) 2 SCC 38) wherein it was said that by purporting to construe the contract the Court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. That is exactly what the Court has done in the instant case. Therefore, the issue stands covered by this decision and the learned counsel for the respondents could not in the face of this decision argue otherwise.

3. In the result, we allow these appeals and set aside the impugned order of the Division Bench of the High Court with no order as to costs. "

14. As to whether an arbitrators' jurisdiction is circumscribed by the contract, and whether an award in respect of matters which decide excepted matters, the judgment of the Supreme Court, in *Vishwanath Sood (supra)* onwards, down to *General Manager*,

Northern Railway & others –vs- Sarvesh Chopra 2002 (4) SCC 45 are clear authorities. In *Oil And Natural Gas Corporation Ltd. –vs- Saw Pipes Ltd.*, 2003 (5) SCC 705, the court, quoted with approval the formulation in *Sarvesh Chopra*, and held that arbitrators are not justified in ignoring express terms of contract. In *Saw Pipes*, the court also approved the ruling in *Rajasthan States Mines & Minerals Ltd., V. Eastern Engineering Enterprises*, 1999 (9) SCC 283, where it was held that:

“The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his  jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may be tantamount to mala fide action.

It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose agreement is required to be considered. ...

* * *

He cannot award an amount which is ruled out or prohibited by the terms of the agreement.”

15. The relevant holding in *Vishwanath Sood*, regarding jurisdiction of an arbitrator being circumscribed, and subject to the “excepted matters” clause, is extracted below; it has been universally followed in several later rulings, and still holds the field:

“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 determination 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 awarding 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."

16. The condition in this case, i.e Clause 11-C is in similar terms as Clause 25; it is in *pari materia* to what was considered in *Ramnath International*. This court is, therefore, of the opinion that the award was in respect of a matter that was clearly beyond jurisdiction of the arbitrator, being an "excepted" item.

17. Even otherwise, the court is of the opinion that the award betrays non application of mind to the facts; the petitioner's letter of extension dated 12-8-1997 had clearly posited that it was subject to "Nil" financial implication. This meant that the contractor could not have claimed any amount, towards the head which was ultimately awarded. Nothing was shown from the correspondence or the record to support the contractor's disclaimer or protest against this conditional extension of time. In the circumstances, the arbitrator could not have awarded the sum that he did.

18. The above infirmities in the award are clearly of the kind, considered to be beyond jurisdiction of the arbitrator, as contrary the contract; therefore, falling within the scope of judicial intervention according to the law declared in *Saw Pipes (supra)* and the subsequent rulings of the Supreme Court. The petition therefore, deserves to succeed. OMP 355/2004 is accordingly, allowed; the impugned award of the sole Arbitrator dated 24th April, 2003 whereby the claim was

allowed to the extent of Rs. 2,30,000/-, in favour of the respondent Contractor with interest at 15% per annum, is hereby set aside. In the circumstances, the parties shall bear their own costs.

DATED: 13th August, 2008

S. RAVINDRA BHAT, J