

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 17.01.2011

FAO(OS) 32/2005

PROGRESSIVE CONSTRUCTIONS LTD.

..... Appellant

Vs

M/S SHARMA & ASSOCIATES CONTRACTORS (P) LTD.

..... Respondent

Advocates who appeared in this case:

For the Appellant: Mr Sanjay Jain, Sr. Adv. with Ms Anuradha Mukherjee, Adv.
For the Respondent: Mr Sandeep Sharma & Ms Kanika Singh, Adv.

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

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

RAJIV SHAKDHER, J

1. By this order we intend to dispose of the captioned appeal preferred against the order of the learned Single Judge dated 08.11.2004 passed in suit no. 492/1999. The learned Single Judge, by virtue of the impugned judgment has sustained the award of the learned Arbitrator dated 18.02.1999. The appellant before us, i.e., Progressive Constructions Ltd. (hereinafter in short referred to as 'PCL') was the original respondent before the learned arbitrator, while the respondent herein, i.e., Sharma & Associates Construction (P) Ltd. (hereinafter in short referred to as 'SAPL') was the original claimant. We would be referring to the parties by their names, as indicated hereinabove.

2. Before the learned arbitrator SAPL had referred seven (7) claims. By virtue of the award the arbitrator allowed claim nos. 1 to 3. Resultantly, the total amount awarded in favour of the SAPL is a sum of Rs 28,90,107/- along with interest at the rate of 15% per

annum with effect from 01.01.1994 till the date of passing of the decree or payment whichever eventuality occurred earlier point in time.

2.1 Before us arguments have been confined to claim no. 1 and 6. Claim no. 6 essentially deals with interest. PCL, before us, therefore, has not pressed its challenge qua claim no. 2 pertaining to retention of amount from SAPL running bills. This claim amounted to Rs 30,000/-. Similarly claim no. 3, which related to release of money deducted by PCL from running bills towards security deposit has also not been pressed before us. This claim amounted to a sum of Rs 2,04,189.66/- . Apart from claim nos. 2 and 3, which are not pressed; PCL has also not disputed the payment of escalation to SAPL, in the sum of Rs 7,17,560/-. This amount is actually subsumed in claim no. 1 whereby, the arbitrator has awarded a sum of Rs 26,55,917/-; as this amount which otherwise being admitted as being payable to SAPL had not been paid till the stage of adjudication was reached before the learned Arbitrator. Reference in this regard may be had to paragraphs 18 and 20 of the award. Therefore, essentially the dispute relates to claim no. 1 amounting to Rs 19,38,357/-; which SAPL claims on account of revised rates received by PCL in turn from the main contractor, i.e., Hindustan Steel Works Construction Ltd. (hereinafter in short referred to as 'HSCL') towards deviation in quantities. Thus the core issue before us is whether the learned Arbitrator's finding that SAPL could lay claim on the monies received by PCL on account of revised rates for deviations under a separate contract with HSCL was perverse. As noticed above, the other ancillary issue which would arise for our consideration is with regard to interest.

3. Before we advert to the submissions made before us in respect of the said issue, let us briefly sketch out the broad contours in the background of which the dispute arose between the parties at hand.

3.1 It appears that the National Hydro Electrical Power Corporation Ltd. (in short 'NHPC') in its capacity as the employer entered into a contract dated 28.01.1986 with HSCL. The said contract involved construction of a "left side afflux bund from RD-00 M to

RD-1700 M of Tanakpur Hydro Electrical Project, in Tanakpur District Nainital, Uttar Pradesh” (hereinafter referred to as the ‘said works’).

3.2 HSCL in turn with the consent and knowledge of NHPC sub-contracted the said works to PCL vide contract dated 16.07.1991 (hereinafter referred to as the ‘main contract’). It appears that parallely on 09.02.1990 a contract was drawn up between PCL and SAPL for further sub-contracting the works in issue which had been awarded by HSCL to PCL. What is not disputed, is the fact (which is recorded by the learned Arbitrator in paragraph 36 & 47 of the impugned award) that as between HSCL and PCL a further sub-contract was not permissible.

3.4 The contract dated 09.02.1990, however, as between PCL and SAPL was signed and sealed on 15.04.1992 (hereinafter referred to as the sub contract). There is no dispute that in the main contract there is a reference to certain documents which were generated prior to the execution of the main contract between HSCL and PCL in sub-clause (a) to (l) of clause 2. By virtue of the said Clause 2 appearing in the main contract, these pre-contractual documents stood incorporated in the said contract. For our purposes, however, sub-clause (i) of clause 2 of the main contract is relevant as it refers to five (5) letters exchanged between HSCL and PCL. We, therefore, straightway refer briefly, to the letters as to our minds it would impact the conclusion reached in the instant case. The first letter is a letter dated 26.12.1989 where PCL indicates that since size of individual packages (i.e., the works) is too small, they were not interested in responding to the tender notice, and that if, similar works were clubbed to form one package they could consider seeking award of work at negotiated rates. This letter was followed by a letter dated 01.01.1990. The second letter alludes to the fact that there could be a tripartite arrangement between NHPC, HSCL and PCL so as to facilitate direct payments from NHPC to PCL on submission of bills to NHPC under intimation to HSCL. What is relevant for our purposes is *clause (iv)* of the said letter wherein, in respect of *item no. 1*, PCL indicates that if NHPC was to agree to execution of the said job a rate of Rs 30 per cubic metre or more against HSCL’s claim of Rs 40 per cubic metre then they would be agreeable to execution of the job on HSCL tendered rate

subject to retention of 5% of the proceeds by HSCL. It appears that third letter of even date, i.e., 01.01.1990 was issued by PCL seeking to correct a typographical error in respect of the contents of paragraph (iv) appearing in its earlier letter so as to include what had been stated therein, as being applicable even to *item no. 2*. This request, it appears, was reiterated by PCL in its letter of 08.01.1990 wherein, PCL made the following offer to HCL:

“We offer a rebate of 5% of the sum(s) to be received against the work done by us on Afflux Bund and protection works for the Barrage of Tanakpur H.E. project in case the rates for item (1) are increased by M/s NHPC, at least to Rs 30/- per cum and a corresponding increase in the rate of item (2).”

(emphasis is ours)

3.5 Once again in the letter of 09.01.1990 a somewhat similar reiteration of the offer was made at a lower rate. The relevant portion of the averment in this respect is extracted for the sake of convenience:

“We have been given to understand that M/s HSCL are expecting to be paid @ Rs. 25 per cum in respect of item no. (1). In that event we agree to offer a rebate of 5% of the sum(s) to be received against the work done by us.

(emphasis is ours)

3.6 A reading of the said clause seems to indicate following:

- (i) First, that PCL was expecting that HSCL would get rates revised for *item nos 1 and 2* of the contract.
- (ii) second, PCL expected to be paid at the revised tendered rates which HSCL would arrive at with NHPC subject to HSCL being offered a 5% retention, i.e., rebate.

4. There is both in the award, as well as in the appeal a reference to a letter bearing no. PCL/201/1104, dated 01.02.1990 issued by PCL to HSCL. In paragraph 8 of the said letter once again there is a reiteration of what we have referred hereinabove. Once again, for the sake of convenience, the said clause on which much reliance is placed by the learned arbitrator as well as parties before us is extracted hereinbelow:

“In the event of M/s HSCL getting the enhanced rate for earth work excavation item no. 1 due to division in the overall contracted quantity between M/s HSCL and M/s NHPC, we shall be paid at the enhanced rate for the quantity on earthwork executed by us. As and when the rate for item no. 1 is enhanced at least to Rs 25 (rupees twenty five) per cum and the amount is received by us, the amounts paid to us towards 10% as per para 7 above, may be adjusted from the additional amount so received by us, provided the enhanced rate for item no. 1 is applied atleast for a quantity of 4,00,000 cum.” (emphasis is ours)

5. Based on the aforesaid, in respect of claim no. 1 it was argued before learned arbitrator that PCL was required to pass on, the money, which it had received on account of revised rates from NHPC subject to PCL returning 4% in the form of rebate. The 4% rebate or retention of money which SAPL offered to PCL, was based on the stand of SAPL that the three contracts referred to hereinabove were back-to-back contracts, and, therefore, the rates referred to and reflected in the sub contract were configured and negotiated based on 4% a retention of proceeds by PCL against various items of work envisaged in the main contract executed between PCL and HSCL. It is not disputed that for this purpose SAPL had placed before the learned Arbitrator a calculation, which showed that in regard to rates for six (6) items in respect of work which was entrusted to SAPL, and which decidedly formed part of the main contract, there obtained a differential of 4%. Based on this material and letter dated 28.02.1992 (Ex P-9/1), which incidentally has not been placed before us, the learned arbitrator rejected the submissions of PCL that this was a mere coincidence or a “*loose reference*” in the sub contract executed between PCL and SAPL.

6. In the background of these broad contours of the case, in support of the appeal, Mr Sanjay Jain, learned senior counsel, assisted by Ms Anuradha Mukharjee made the following submissions before us.

(i) the contract between PCL and SAPL was an independent contract and, therefore, in determining as to whether or not SAPL was entitled to the sums claimed one ought to look only at the terms of the said contract;

- (ii) as a necessary corollary to his first submission, he contended that the learned arbitrator committed a grave error in law bordering on perversity, in as much as, he imported into the sub contract executed between PCL and SAPL a term agreed to between HSCL and PCL which was clearly the subject matter of the main contract;
- (iii) in order to demonstrate this error stress was laid on clause 16 of the sub contract which provides for escalation. It was contended that a perusal of said escalation clause would show that where parties intended to dovetail the terms of the main contract into the sub contract it did so by making a specific reference to that effect in the sub contract;
- (iv) in other words it was his submission, that the learned Arbitrator misconstrued the provisions of clauses (1), (2) and (9) of the sub contract, by coming to the conclusion that they were indicative of the fact that there was an incorporation of the terms of the main contract in the sub contract; and
- (v) lastly, the approach of the learned arbitrator in resorting to the principles of incorporation was contrary to the clear and explicit terms of the sub contract obtaining between PCL and SAPL.

6.1 In support of his submissions made, it was further contended that the other principles of law, which were taken recourse to by the by the learned arbitrator to buttress his finding that there was incorporation of the terms of the main contract in the sub contract, such as those, pertaining to constructive trust and restitution, were unnecessary in view of the fact that parties had to be governed by the terms of the contract executed between them. The arbitrator by stepping outside the terms of the sub contract had committed an error of jurisdiction, in as much as he had to decide the lis obtaining between the parties by confining himself within contours of the said contract. In support of his submissions reliance was placed upon a judgment of the Supreme Court in the case of ***Rajasthan State Mines & Minerals Ltd. vs Eastern Engineering Enterprises & Anr. JT 1999 (7) SC 379.***

7. As against this, Mr Sharma, who appeared for the respondent, relied largely on the reasoning given in the award. Ms Sharma stressed that the three contracts referred to hereinabove, were back-to-back contracts. He also contended that since the labour in

respect of the works in issue had been expended by SAPL, in justice and equity as also in terms of the sub contract, as interpreted by the learned arbitrator, SAPL was entitled to money as prayed for in claim no. 1. Mr Sharma also endeavoured to rely upon the order of learned Single Judge, who had sustained the view that a court while hearing objections to an award, is not to function as an appellate court and hence, conduct an exercise of re-appreciation of evidence or findings of fact returned by an arbitrator unless the findings bordered on perversity. He further contended that if two views were possible even then, courts would ordinarily refrain from interfering with the award unless the view held by the learned arbitrator was unreasonable and against public policy.

7.1 On the aspect of interest, Mr Sharma, however, conceded that he was not in a position to justify the period of its commencement, that is, w.e.f 01.01.1994 as directed by the learned Arbitrator. Mr Sharma, therefore, submitted that SAPL would be willing to accept to interest being granted at the rate of 12% per annum (as directed by the learned Single Judge) w.e.f 01.04.1995.

8. At the outset, before we proceed further we may only indicate that parties chose to rely on the paper book before us. They did not rely upon any other record or document filed before the learned arbitrator. As a matter of fact none was placed before us for consideration, as both counsels proceeded on the basis that the paper book was sufficient to adjudicate upon the disputes in the appeal as it related to interpretation of the contract in issue.

9. On consideration of the submissions made before us and upon perusal of contracts and the documents appended thereto, in our view, following emerges:

9.1 There were back-to-back contract executed between NHPC, HSCL, PCL and SAPL. The contracts, even though back-to-back had their own defined spheres, in which, each was to operate. It is not disputed that the learned Arbitrator had no occasion to consider the terms of the contract dated 28.01.1986 executed between NHPC and HSCL. The contract executed between HSCL and PCL (i.e., the main contract) was rather pithy. The main contract, as noticed by me hereinabove, was preceded by correspondence exchanged

between the parties. It is obvious that PCL right from 01.01.1990 was seeking to negotiate with HSCL for payment of extra sums of money in respect of *item nos. 1 and 2* on the condition that if HSCL was to receive proceeds against work executed based on the revised rates from NHPC, the revenue had to flow to it subject a rebate and/or retention of 5% in favour of HSCL. This, as noticed by us hereinabove, was the broad stand taken by PCL with minor modifications in all of its pre-contractual correspondence with HSCL. Interestingly, the learned arbitrator has referred to a letter dated 01.02.1990, in particular, clause 8 of the said letter, which has been extracted by us hereinabove, to demonstrate the same aspect. The learned arbitrator, however, has referred to this as a parallel contract. For some reason PCL in its appeal [see paragraph 4(c)] has averred that this letter formed part of the main contract executed between HSCL and PCL. In our view this is an error which both the learned arbitrator and PCL committed as the letters which formed part of the main contract executed between HSCL and PCL [see clause 2(i)] there is no reference of this letter. Nevertheless, the letter dated 01.02.1990 only reiterates, with some modifications, in sum and substance, what is stated in the pre-contractual correspondence which, undoubtedly forms part of the main contract executed between HSCL and PCL.

10. What is important to note at this juncture is that in the schedule of rates annexed to the sub contract executed between PCL and HSCL there is a reference to six (6) items. The revision in rates which PCL and HSCL were adverting to in pre-contractual correspondence related to only item nos. 1 and 2. And if one were to accept the arbitrator’s reasoning then, as per paragraph 8 of the letter dated 01.02.1990, revision of rates was to be confined only to item no. 1. Contrast this with the statement of claim filed by SAPL wherein, reference is made to revised rates in respect of item nos. 1 and 6. The relevant averments in this regard have been made by SAPL in paragraph 7 and 10 of the statement of claim. The sum and substance of the submissions made by SAPL in its statement of claim filed before the learned arbitrator is more clearly demonstrable by the following tabulated data extracted from the statement of claim:

Items	Original rates	Revised rates	Original rate	Revised rates
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	between HSCL and PCL (Rs)	between HSCL and PCL (Rs)	between PCL and SAPL (Rs)	between PCL and SAPL (Rs)
Item No. 1	14 cum	33.49 cum	13.44 cum	33.49-1.34 = 32.15 cum
Item No. 6	193 cum	249.82 cum	32.15 cum	249.82-11.99 = 237.82 cum

11. To be noted that the deduction of Rs 1.34 cum from item no. 1 and Rs 11.99 from item no. 6 is the 4% rebate which, SAPL claims PCL could retain against revised rates against the said items of work. How it impacted the tenability of claim no.1 which comprised of item nos 1 and 6 is dealt with by us in the latter part of our judgment.

12. Another aspect of the matter which perhaps had a bearing and was lost sight by the learned arbitrator, was that along with statement of claim, SAPL had filed a detailed worksheet by way of an annexure justifying the quantification of the amount under claim no. 1. In the said annexure to the statement of claim, SAPL clearly states that PCL was liable to pay the amount on account of revised rates based on “*escalation*” as per the provisions of clause 16 of the sub contract. It is not disputed before us by the learned counsel for SAPL that towards escalation what is due to the SAPL is a sum of Rs 7,17,560/-. This aspect has also been noted in the arbitrator’s award as noticed by us hereinabove. The learned counsel for PCL also did not dispute that PCL was required to pay the said amount to SAPL. Therefore, the entire endeavour of SAPL to seek payment of money under claim no. 1 was premised on the escalation clause (i.e., clause 16) obtaining in the sub contract executed between itself and PCL. The learned arbitrator instead of examining the validity of the claim based on stand taken by SAPL has proceeded to advert to the principles of incorporation of the terms of the main contract in the sub contract. In our view, this was wholly unnecessary. The reason being: that wherever parties intended to incorporate the terms of the main contract obtaining between HSCL and PCL into the sub contract a specific reference was made. One such instance was clause 16. A perusal of clause 16

would show that parties had articulated such an eventuality. For the sake of convenience clause 16 is extracted hereinbelow:

“16. Escalation: Escalation shall be calculated and paid as per the formula given in the agreement between principal contractor and M/s Hindustan Steel Works Construction Ltd., on the work done by the work-contractor.”

(emphasis is ours)

12. The learned arbitrator, however, by a strained reasoning came to a conclusion that a perusal of clause 1, 4 and 9 would show that terms of the main contract to the extent they were “sensible” stood explicitly incorporated in the sub contract. A bare perusal of clause 1 would show that it pertains to the **“period of completion”**. Even though the heading of clause may not guide the interpretation, however, a close scrutiny of clause 1 itself would adequately justify such an interpretation. Similarly, clause 9 pertains to completion of the work. A perusal of clause 9 would show that it again refers largely to specifications given in the main contract executed between PCL and HSCL, and therefore, if at all the terms with regard to the same stood incorporated in the sub contract obtaining between PCL and SAPL. Lastly, according to us, the error which the learned arbitrator committed was in reading clause 4 de hors the main part of clause 2 of the sub contract. The learned arbitrator seems to have proceeded on the basis that a reading of clause 4 would show that all monies that PCL received from HSCL had to be credited to the account of SAPL after carrying out deductions stipulated in sub clause (i) to (iv) of clause 2. What was lost sight of by the learned arbitrator was that the main part of clause 2 specifically refers to the **“rates”** at which the SAPL would be paid in respect of the work entrusted to it. Furthermore, a close scrutiny of the recitals of the sub contract between PCL and SAPL would show that what SAPL was entrusted was **“part work”** of the construction of the works in issue. Though we are conscious that the recital does not govern the interpretation of the contract but it does provide an indication as to what the contract envisages. It is quite obvious that, it was perhaps not the intention of the parties, at the time when the contract between them was first executed, that the entire work would be entrusted to SAPL. Therefore, what was agreed to

between the parties was a schedule of rates for each item of work at which SAPL had to be paid. The fact that the rates of SAPL were so negotiated that there were 4% less than rates which PCL had negotiated with HSCL in our view is not material in as much as one would have to pay, in our view, obedience to the express term of the contract to ascertain the intention of the parties unless they are ambiguous or lacked clarity. That not being the case in the instant matter there was no scope for the learned arbitrator to ascertain the intent of the parties dehors the express terms of the contract. The classic example of this palpable error is this that while in the pre-contractual correspondence exchanged between PCL and HSCL revision of rates was spoken of with respect to only *items nos. 1 and 2*; in the statement of claim, SAPL has sought revision in rates, in respect of item nos. 1 and 6 which, is its claim no.1. The learned Arbitrator in allowing claim no.1 has gone even beyond the terms of the main contract. Therefore, in our view the entire edifice of SAPL's claim no.1 is unsustainable. SAPL's case becomes worse if one were to resort to the letter date 01.02.1990 as it refers only to revision of rates in item no. 1. As noted above, letter dated 01.02.1990 does not form part of the pre-contractual correspondence expressly referred to in the main contract. It is to be noted that in paragraph 8 of the letter dated 01.02.1990 there is no reference to the amount that PCL would be entitled to retain against payments received from HSCL. The learned arbitrator has evidently first gone on to interpret that provision of paragraph 8 of the letter dated 01.02.1990 would stand incorporated in the main contract obtaining between PCL and HSCL and then, by method of induction cobbled up a retention in favour of PCL to the extent of 4%. In our view, such a re-working of the contract cannot be part of the domain of the arbitrator's jurisdiction. The learned arbitrator in our view has clearly gone beyond the terms of the contract. Therefore the finding, based on such a reasoning, in our opinion, is perverse.

14. The submission of Mr Sharma that the court cannot re-appreciate evidence or sit in appeal over the view of the arbitrator admits to this one exception, which is, that a court can undoubtedly interfere where the arbitrator has returned a finding which is contrary to the terms of the contract. In our view this being a jurisdictional error, any finding based on

such a reasoning is necessarily perverse. Therefore, the submission of Mr Sharma that where two view are possible, the court ought not to interfere with the award is also untenable. In our opinion the view taken by the learned arbitrator was completely untenable.

14.1 At this stage, we may only add that one cannot but agree with the arbitrator that in interpreting the terms of a contract one could always resort to the tools of constructive trust and unjust enrichment, albeit in a case, which requires the usage of such legal tools. However, keeping in mind the view that we have taken, resort to such legal tools was unnecessary. The learned Arbitrator ought to have confined himself to the terms of the sub contract. The learned Single Judge seems to have been of the opinion that the learned Arbitrator's view was a possible one and that the court in a proceeding under Section 30 of the Arbitration Act, 1940 could not sit as a court of appeal. For the reasons articulated above by us, we have not been able to persuade ourselves to come to the same conclusion.

15. Accordingly, both the order of the learned Single Judge dated 08.11.2004 and the impugned award are set aside to the extent it dealt with that portion of claim no.1 which was contested by PCL. The appeal is thus allowed in part.

16. PCL by order dated 17.03.2005 had been directed to deposit a sum of Rs 35 lacs with the Registry of this Court. The said sum was deposited on 20.05.2005 By order dated 15.02.2007 directions were issued that SAPL would be released a sum of Rs 10 lacs. SAPL received the amount on 09.03.2007. PCL has conceded payment of Rs 951749.66 (rounded off to Rs 951750/-) to SAPL (see paragraph 2 above). SAPL would therefore be entitled to simple interest at the rate of 12% p.a w.e.f 02.06.1992 from the date of completion of work till appointment of Arbitrator by this Court vide order dated 20.03.1997. We have, in taking this date, considered the concession of Mr Sharma. On a careful perusal of paragraphs 99 and 100 of the award the learned arbitrator has given his reason for awarding interest from 01.01.1994. Therefore, the concession of Mr Sharma was based on an incorrect reading of the award. However, the reasoning of the learned arbitrator and Mr Sharma's concession was relevant in respect of the contested portion of claim no. 1, i.e., Rs

19,38,357/-. In so far as the uncontested portion of the claim is concerned, interest should accrue from the date of completion of work, in the absence of any other details available with us. We have also assumed that the Arbitrator soon thereafter entered upon reference; therefore from 20.03.1997 till date of release of monies, that is, 09.03.2007 SAPL will be entitled to interest at a simple rate of 12% p.a. The registry shall release the money to the parties out of the balance available with it having regard to the direction contained hereinabove and interest accrued thereon, if any, would follow the principal. In these circumstances, parties shall bear their own costs.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL, J

JANUARY 17, 2011
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