THE HIGH COURT OF MADHYA PRADESH: JABALPUR

(Division Bench)

A.R.No.13/2019
(M/s Surana Fabricators vs. State of Madhya Pradesh & another)

Shri Amit Kumar Singh, learned counsel for petitioner.
Shri Shekhar Sharma, learned Additional Advocate General for the State of M.P. & its functionaries.

&
A.R.15/2019
(State of Madhya Pradesh & another vs. M/s Surana Fabricators)

Shri Shekhar Sharma, learned Additional Advocate General for the State of M.P. & its functionaries.
Shri Amit Kumar Singh, learned counsel for respondent.

CORAM:
Hon'ble Shri Justice Sanjay Yadav, Judge.
Hon'ble Shri Justice Atul Sreedharan, Judge.

O R D E R

27.01.2020

Per : Sanjay Yadav, J.

With the consent of learned counsel for the parties, the matter is finally heard.

2. These two Revisions under Section 19 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as '1983 Adhiniyam') are directed against the Award dated

18.01.2019 passed by the Madhya Pradesh Arbitration Tribunal, Bhopal.

3. The Arbitration Revision No.13/2019 is by the Contractor. The Arbitration Revision No.15/2019 is by the State of Madhya Pradesh and its functionaries.

4. The agreement No.14/2007-08 was entered into between the State of Madhya Pradesh and the Contractor on 29.03.2008 for supply and erection of steel aqueduct at RD 77866 to 79366 of Harsi High Level Main Canal with Civil Works including designing, fabrication and commissioning. The amount of contract was Rs.4,43,84,940/-. The completion period was 24 months including rainy season. The due date of completion was 29.03.2010. The payment was to be done as per Clause 5 of the agreement which provided for:

> "5. For execution of steel work payment against agreement amount shall be released as under:
>
> a. On submission of drawing/design by working agency/until after receipt of sanction from competent authority -10%
>
> b. On supply of construction material/component at the place of work -75%
>
> c. (a) On completion of complete work with established work -15%"

5. On submission of drawing/design after receipt of sanction for competent Authority; the Contractor was paid 10% of the amount of

agreement i.e. Rs.45,70,418/- on 16.05.2008, after standard deduction. The Contractor thereafter supplied 495 mts. of M.S.Pipes 2000 MM dia 6, M length @ 51497 per M, whereon, as per Clause 5 of the agreement 75% of the cost of executed work was to be paid, but only 65% i.e. Rs.1,65,69,160/- was passed as the welding work was not carried out and the work was incomplete, as such 10% amount was withheld. The Contractor was paid Rs.90,69,160/-, remaining Rs.75,00,000/- could not be paid for want of fund. The said amount was however, later paid.

6. The Chief Engineer vide communication dated 30.03.2009 called upon the Contractor to revise/modify the design, as early designs and drawings were disapproved.

7. The fresh designs and drawings were submitted on 10.06.2009, which the Engineer in Chief forwarded to Member D & R Central Water Commission (CWC) for its approval. Whereon, the CWC prepared a RCC drawing, and design which were less costlier than the MS Pipe aqueduct.

8. Consequently, decision was taken to abandon the work and replace it with RCC drawings and designs.

9. The Contractor was informed on 12.01.2012 about the new scheme and was called upon to refund the amount already paid to it and take back the M.S.Pipe aqueduct. The Chief Engineer in exercise of his powers under Clause 4.3.14 of the agreement

revoked the same vide letter dated 19.09.2012. Simultaneously, an Revenue Recovery Certificate (RRC) for recovery of Rs.74,76,735/- was issued. The recovery was of outstanding from other contract. In these factual background the Contractor made following claim vide application under Section 7 of 1983 Adhiniyam:

Claim No.	Description of claims	Amount in Rs.
1	Claim for payment of work done	Rs.86,21,814.00
2	Claim for refund of SD	Rs.13,18,722.00
3	Claim for refund of withheld amount	Rs.75,00,000.00
4	Claim for loss of profit and overheads	Rs.33,70,754.00
5	Claim for refund of LUN charges	Rs.11,22,096.00
6	Claim for payment of interest	Rs.78,96,019.00
7	Rejection of award passed by final authority	Rs.74,76,735.00
	Total	Rs.2,98,29,405.00

10. The Tribunal allowed claims No.2, 3 and 5, however, declined claim No.1, 4, 6 and 7.

11. Petitioner/Contractor has confined his challenge to rejection of Claim No.4.

12. The claim No.4 was for loss of profit and loss of overhead charges Rs.33,70,754/-. It was the contention of the Contractor before the Tribunal that total work worth Rs.4,43,84,940/- was to be executed but the work worth Rs.2,19,13,247/- was got executed and he was deprived of the work to the tune of Rs.2,24,71,693/- by

abandoning the same, as such was deprived from earning profit from the unexecuted work. It was urged that to execute the work the infrastructure was deployed which added to his overhead expenses.

13. The Tribunal relying on the stipulations contained in Clause 4.3.14 of the agreement declined the claim.

Clause 4.3.14 of the agreement stipulates:

> "4.3.14. No claim to any Payment or Compensation for alteration in or restriction of Works- If at any time after the execution of the contract documents, the Engineer-in-charge shall for any reason whatsoever require the whole or any part of the work as specified in the tender, to be stopped for any period or shall not require the whole or part of the work as specified in the tender, to be stopped for any period or shall not require the whole or part of the work to be carried out at all or to be carried out by the Contractor, he shall give notice in writing of the fact to the Contractor who shall thereupon suspend or stop the work totally or partially as the case may be. In any such case, except as provided hereunder the Contractor shall have no claim to any payment or compensation whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not so derive in consequence of the full amount of the work not having been carried out or on account of any loss that he may be put to, on account of materials purchased or agreed to be purchased, or of unemployment of labour recruited by him. He shall not also have any claim for compensation by reason of any alterations having been made in the original specifications, drawings, designs and instructions which may involve any curtailment of the work as

> originally contemplated. Where, however, materials have already been purchased or agreed to be purchased by the Contractor before receipt by him of the said notice, the Contractor shall be paid for such materials at the rates determined by the Engineer-in-charge, provided they are not in excess of requirements and are of approved quality and/or shall be compensated for the loss if any, that he may be put to in respect of materials agreed to be purchased by him, the amount of such compensation to be determined by the engineer-in-charge whose decision shall be final. If the contractor suffers any loss on account of his having to pay labour charges during the period during which the stoppage of work has been ordered under this clause, the Contractor shall on application be entitled to such compensation on account of the labour charges as the Engineer-in-charge whose decision shall be final, may consider reasonable, provided that the contractor shall not be entitled to any compensation on such account of labour charges, if in the opinion of the Engineer-in-charge, the labour could have been employed by the Contractor elsewhere for the whole or part of the period during which the stoppage of the work has been ordered as aforesaid."

14. Relying on the decision in ***M/s A.T. Brij Paul Singh vs. State of Gujarat (1984) 4 SCC 59***, it is contended on behalf of the Contractor that having been illegally deprived to complete the contract, wherefor, all infrastructural arrangement has been made, which if allowed to have completed, would have helped the Contractor to earn profit and to meet out overhead charges incurred

on the infrastructure to complete/execute the work. In *M/s A.T. Brij Paul Singh* (supra) it is held:

> "8. Once is it held that the respondent was guilty of breach of works contract, part of which was already performed and for performing which the appellant, a Poona based contractor had transported machinery and equipment from Poona to the work site near Rajkot in Saurashtra, certainly he would be entitled to damages. One of the heads of damages under which claim is made is 'loss of expected profit in the work'. The claim under this head as canvassed before the High Court was in the amount of Rs. 4,30,314/-"

15. In the case at hand, the Contractor having agreed that unless excluded by or repugnant to the context include his heirs executors, administrators, representatives and assigns shall permit the Government at the time of making any payment to him for work done under the contract, to deduction amount equal to five percent, of all money so payable till such sum earnest money deposited by him totals five percent, of the probable amount of the contract or percent, of the cost of the work executed, when the same exceeds the estimated amount of the contract, is bound with the terms agreed, as will entitle him for the compensation towards loss of profit or towards overhead charges.

16. In this context reference can be had of the decision in ***State of Karnataka vs. Shree Rameshwara Rice Mills, Thirthahalli (1987) 2 SCC 160*** wherein the Supreme Court was in seisin with the

challenge to an order passed by the Full Bench of the Karnataka High Court answering the reference qua act of the State in effecting a recovery towards damages by issuing Revenue Recovery Certificate. The reference was answered by the Full Bench of Karnataka High Court that -

> "Where an agreement between the State and a private person provides that for any breach of any of the conditions of such agreement by such person he shall be liable to pay such damages as may be assessed by the State and that any amount that may become due or payable by such person to the State under any part of that agreement, shall be deemed to be and may be recovered from such person as if they were arrears of land revenue--
>
> (i) the State is not competent to adjudicate upon the question whether such a person committed breach of contract and that the State is not competent to assess damages for any breach of the contract which is not admitted by the other side:
>
> (ii) damages so assessed cannot be recovered from such person as if they were arrears of land revenue".

- Their Lordships while dwelling on Clause 12 of the agreement therein, held:

> "7. … The terms of Clause 12 do not afford scope for a liberal construction being made regarding the power of the Deputy Commissioner to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. The crucial words in clause 12 are "and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the

second party". On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of Clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the Officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests or justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the Officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

8. We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of

conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is disputed.

9. The further question requiring consideration is regarding the power of the State to recover damages as arrears of land revenue under the Revenue Recovery Act. The Full Bench has taken the view that the State is not entitled to recover damages as arrears of land revenue because damages for breach of conditions will not amount to "money due under the contract". The Full Bench has relied upon a decision of this Court in Divisional Forest Officer v. Mool Chand, AIR 1971 S.C. 694 in support of its view. This decision cannot be an authority for the view taken by the Full Bench because it has been rendered with reference to facts which are entirely different. What fell for consideration in that case was whether a tender amount could be recovered from a defaulting forest contractor as arrears of land revenue when Section 75 of the Forest Regulation and Rule 10 of the Rules made thereunder did not provide for such realisation. We are, however, concerned with cases where the agreement entered into between the Government and the private persons specifically provides for recovery of damages as arrears of land revenue. What the Full Bench has failed to notice is that even though the damages become payable on account of breach of conditions of the contract, the liability to pay damages does not fall outside the terms of the contract but within the terms of the contract. The words "any amount that may become due or payable by the first party to the second party under any part of this agreement" have to be read in conjunction with the earlier portion of the clause stipulating liability on the party contracting with the State to pay damages for breach of conditions. Therefore, it follows that though damages become payable on account of breach of conditions of the agreement they nevertheless constitute

> amounts payable under the contract i.e. under one of the terms of the contract imposing liability to pay damages for breach of conditions. To illustrate the position if the agreement provides for a liquidated sum being paid as damages for breach of conditions instead of a sum to be assessed by the Deputy Commissioner, it cannot be said that the specified damages will not be money due under the contract and hence the damages cannot be recovered under the Revenue Recovery Act. What applies to specified damages will likewise apply to damages which are quantified after assessment. We, therefore, hold that the opinion of the Full Bench in so far as the recovery of damages and arrears of land revenue is concerned is not in accordance with law."

17. In the case at hand, no such term of agreement has been commended at by the Contractor as would entitle him to claim loss of interest and the damages towards the work which has been revoked in exercise of the powers under Clause 4.3.14 of the agreement.

18. In view whereof, the conclusion arrived at by the Tribunal qua claim of loss of profit and damages cannot be faulted with as would warrant an indulgence. The Tribunal since was well within its jurisdiction in declining the claim, no interference is caused.

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19. The State of Madhya Pradesh & its functionaries have taken exception to the Award solely on the ground that the Tribunal had glossed over the fact, which was specifically pleaded that, the Contractor was liable for recovery of Rs.74,75,735/- being the dues

arising from other contracts covered by the agreement No.13/2007-08, 14/2007-08, 15/2007-08, 16/2007-08 and 17/2007-08.

20. The award reveals that the Contractor had questioned the same under claim No.7, Tribunal found:

> "37. Claim No.7: Rejection of award passed by final authority: The petitioner pleading in para 5.7 of the reference petition has submitted that the claim of Rs.7475735/- sought by the respondents in pursuance of order dated 13.10.2014 (Ex.P/4) passed by the Superintending Engineer rejecting the petitioner's claim and holding that the said amount i.e. 74,75,935/- is to be recoverable from the petitioner.
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> 38. On perusal of the written statement, it appears that no counter claim has been submitted by the respondents in this case. The respondents only defended against the petitioner's case, therefore, there is no need to discuss and pass any order pertaining to the relief sought by the petitioner in para 5.7 of the reference petition. The foresaid claim is decided accordingly."

21. Though an effort is made on behalf of the respondent-State that the said claim was adjudicatable as the decision was taken by the Superintending Engineer vide order dated 13.10.2014; whereby amount of Rs.74,76,735/- was determined and found to be recoverable from the Contractor in terms of the decision in ***B.B.Verma vs. State of M.P (2007) Arb.W.L.J. 733 (M.P.)***. However, the facts reveal that the recovery was questioned in the proceedings before the Tribunal, and since the over passed by the

Superintending Engineer did not attain finality, the State of Madhya Pradesh and its functionaries had no authority to recover the same. We are fortified in our view by the decision in *B.B.Verma* (supra) wherein it is held :

> "9. A perusal of Clause 4.3.29.2 of the conditions of contract quoted above would show that the decision of the S.E. of the Circle for the time being in respect of questions and disputes mentioned therein 'or as to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to the contract … or otherwise concerning the work of execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be final'. Hence, the decision of the Divisional Officer of the Executive Engineer under Clause 4.3.3.3 of the conditions of contract quoted above to have the unexecuted work completed by another contractor and claim the expenses which may have been incurred in excess of the sum which would have been paid to the original contractor is subject to the final decision of the S.E. if the contractor raises a dispute on such claim made by the Divisional Officer of the Executive Engineer. The second para of Clause 4.3.29.2 further stipulates that if any party to the contract is dissatisfied with the final decision of the S.E. in respect of any matter, he may within 28 days after receiving notice of such decision refer such dispute to the Arbitration Tribunal constituted under the Adhiniyam. Hence, any decision taken and any amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 of the conditions of contract is not final but subject to the decision of the S.E. and any decision of the S.E. on these aspects is also subject to the decision

> of the Tribunal under the Adhiniyam, if referred to the Tribunal by any party to the contract. The result is that the amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 will not become a sum due from the contractor until the dispute is decided by the S.E. on an appeal made before him from the decision of the Executive Engineer or the Divisional Officer, or until the dispute is adjudicated by the Tribunal under the Adhiniyam where the decision of the S.E. is challenged by way of reference."
>
> 10. Further, the Proviso to Section 7-B of the Adhiniyam states that if the Final Authority, namely S.E. fails to decide a dispute within the period stipulated therein, a petition to the Tribunal under Section 7 can be made by a party. Thus, when an appeal against the decision of the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 of the conditions of contract is not decided by the S.E. and a party files a reference under Section 7 of the Adhiniyam before the Tribunal, the amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 will not be due and therefore not recoverable from the contractor as arrears of land revenue under Clause 4.3.38.1 of the conditions of contract until the Tribunal adjudicates the dispute raised by the contractor."

22. In view whereof, conclusion arrived at by the Tribunal qua claim no.7 cannot be faulted.

23. Furthermore, Section 19 of 1983 Adhiniyam stipulates the ground for interference, viz. if the Tribunal - (a) has exercised a jurisdiction not vested in it by law; or (b) has failed to exercise a jurisdiction so vested; or (c) has acted in exercise of its jurisdiction

illegally, or with material irregularity; or (d) has misconducted itself or the proceedings: or (e) has made an award which is invalid or has been improperly procured by any party to the proceedings.

24. As both the parties fail to show any jurisdictional error by the Tribunal, we decline the interference.

25. Consequently, A.R.No.13/2019 and A.R.No.15/2019 are dismissed. No costs.

(Sanjay Yadav)
Judge

(Atul Sreedharan)
Judge

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