

A HIMACHAL PRADESH NAGAR VIKAS PRADHIKARAN
v.
M/S. AGGARWAL & CO.

JANUARY 27, 1997

B [K. RAMASWAMY AND G.T. NANAVATI, JJ.]

C *Contract—Execution of—Escalation charges on material—Claimed by contractor—Held : Not entitled to in view of the fact that the materials were not procured by the Contractor, but were supplied by the Department and the cost of materials worked out.*

P.M. Paul v. Union of India, [1989] Supp. 1 SCC 368, referred to.

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 635 of 1997.

From the Judgment and Order dated 2.5.96 of the Himachal Pradesh High Court in O.M.P. No. 626/93 in Ex. P. No. 27 of 1993.

Rajesh Srivastava, Ujwal Banerjee and H.K. Puri for the Appellant.

E S.B. Upadhyay for the Respondent.

The following Order of the Court was delivered :

Leave granted.

F This appeal by special leave arises from the judgment and order dated May 2, 1996 of the Himachal Pradesh High Court Passed in O.M.P. No. 626/93 in Ex. P. No. 27/1993. The admitted facts are that the respondent had entered into an agreement with the appellant to execute certain works pursuant to which there was a dispute which was referred to the
G Arbitrator, on directions of the High Court. The Arbitrator in the award dated April 25, 1992 stated as under ;

H "After considering whole matter submitted to me by both the parties, both verbally and in writing I have come to this conclusions that delay lies on that part of the respondent-Executive Engineer.

It is awarded that the plaintiffs shall be paid by the respondent- Executive Engineer an increase of 25% over and above their tendered rates for all works executed by them after the stipulated date of completion i.e. 21.5.89." A

The award was made rule of the Court. In implementation of the award, the appellants worked out the details, as mentioned in the letter No. SDA(D)-Acctt-7/93-644-47 dated November 12, 1993 which reads as under: B

"With reference to your letter No. AV/SIM/804-93-94 dated 5.10.1993, I am enclosing herewith a cheque bearing No. 807801 dated 12.11.1993 amounting to Rs. 4,99,307 on account of payment of award announced by the Director which has been made as rule of court by the Hon'ble H.P. High Court. The details of the awarded amounts and recoveries due to be made from you are as under : C

Gross amount of the work done after 11th R/A Bill i.e. after 21.5.1989 onwards upto 26th R/A Bill)		Rs. 69,78,354.00	D
Less cost of material i.e. Cement/Steel supplied by the SDA on which there has been no increase in the issue rates.	(-)	Rs. 23,25,685.00	E
	Net amount	<u>Rs. 46,52,669.00</u>	
25% increase of Rs. 46,52,669/0 as awarded by the Arbitrator.		Rs. 11,63,167.00	F
Less 2% I. = Tax on 23,263 on Rs. 11,63,167 12% S.C. on I. Tax	Rs. 2,792.00 (-)	Rs. 26,055.00	
	Total Rs. 26,055.00	<u>Rs. 11,37,112.00</u>	G
With held on account of recoveries due to be made from you against agreement No. 52 of 1987.88.	(-)	Rs. 6,37,805.00	
	Net payable	<u>Rs. 4,99,307.00</u>	

Please send stamped receipt. H

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Yours faithfully,

(Executive Engineer (D),
Shimla Development Authority,
Kasumpti, Shimla-9".

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It is seen from the contents of the letter that the appellant has deducted only the cost of the material, i.e., cement and steel supplied by the SDA on which there has been no increase in the issue rates. After working out of the details, a sum of Rs. 4,99,307 became due to the respondent. The appellant calculated the amount actually due and payable to the respondent under the award less the income-tax and surcharge etc. and the balance amount came to be paid. But when the respondent claimed a further sum of Rs. 5,81,421, the appellant objected thereto under section 47 of the CPC. The High Court over-ruled the objection and directed payment thereof. Thus, this appeal by special leave.

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It is submitted by Shri H.K. Puri, learned counsel for the appellant that the enhancement of 25% is relatable to the tendered rates for the works executed by the respondent and does not relate to the rates of raw materials supplied by the appellant. He also submitted that cement and steel were supplied by the Department at the schedule rates in spite of the delay in execution of the contract. Thus, escalation in price of raw materials supplied by the appellant the entire burden was borne by the appellant and, therefore, no extra payment could have been intended to be made under the award in respect of those items. Therefore, the High Court was not right in directing payment thereof. We find force in the contention. It is contended by Shri Upadhyay, learned counsel for the respondent, that when the Arbitrator recorded finding that delay in execution was on account of the laches on the part of the Executive Engineer and awarded 15% more than the agreed normal rate, as per the contract and the award having been allowed to become final, it is not open to the appellant to deny 25% escalation charges for the period. In other words, it amounts to interference with the award which has attained finality. In support thereof, the learned counsel relied upon paragraph 12 of the judgment in *P.M. Paul v. Union of India*, [1989] Supp. 1 SCC 368. Therein, the question was whether the contractor was entitled to escalated rates due to delay in execution of the award on the part of the Department. As seen, there is

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no dispute on the proposition that when the award has been made award- A
ing escalation charges, necessarily the increased rates of the cost of secur-
ing the material for performance of the contract are required to be
compensated by paying the amount to the extent of the escalated charges.
It is seen that under Clause 10 of the contract, the appellant was required
to supply the material at the rates prevailing as on the date of the execution B
and it was entitled to deduct the same from the amounts payable after the
execution of the contract. In other words, when the iron and cement were
supplied, during the relevant period, even after the expiry of the year for
which the award came to be made, necessarily it included the increase in
rates. It is stated that they did not charge increased rates but the rates C
prevailing as on the dates and the amount worked out come to Rs.
23.25.785. The respondent is not entitled to 25% of the escalated costs in
that behalf. The very object of awarding escalated cost was that the
contractor had secured the material from the open market at the price
prevailing at the relevant time and used the same for execution of the work. D
In view of the fact that iron and cement were not procured by the
respondent during the extended time and actual price for which they were
supplied has been worked out, as detailed earlier, the respondent is not
entitled to 25% more on that material supplied by the Department itself.
Under these circumstances, the High Court was clearly in error in directing
payment of the said amount. E

The appeal is, accordingly, allowed but in the circumstances without costs.

G.N.

Appeal allowed.