

A THE NEW INDIA CIVIL ERECTORS (P) LTD.
v.
OIL AND NATIONAL GAS CORPORATION

FEBRUARY 17, 1997

B [B.P. JEEVAN REDDY AND SUJATA V. MANOHAR, JJ.]

Arbitration Act—Powers of Arbitrator—Setting aside award—Grounds of—Arbitrator—Exceeding jurisdiction—Held—Arbitrator a creature of an agreement and has to follow limits incorporated in agreement and he cannot interpret—An arbitrator to act within the four corners of the agreement.

C
D The appellant entered into a contract for construction of 304 pre-fabricated housing units for the Respondent. The contract could not be completed even within an extended period. The contract was terminated by the Respondent and the work was done through another agency. There were disputes between the Appellant and Respondent which were referred to a team of two Arbitrators.

E The Appellant had made claims under 19 heads, out of which a total sum of Rs.1,09,04,789 was awarded on 11 claims only. The Respondents made 3 claims, out of which one claim was rejected and two claims were allowed partly to an extent of Rs. 41,22,178. Therefore, the Appellant was held entitled to a net amount of Rs. 67,82,620 with interest at the rate of 18% p.a. from date of award till date of payment.

F The Appellant moved the single judge for making the award a rule of Court. The Respondent filed objections seeking to have the award set aside. The single judge overruled the objection and made the Award a rule of Court.

G On Appeal before the Division Bench, the Respondent confined its challenge to claims under five heads only and did not contest other claims. The Division Bench upheld the Respondent's contentions as regards three claims and rejected the rest.

H On Appeal before this Court, the Appellant contended that there were shortages of cement in the bags supplied by the Respondent and that the Appellant had in their correspondences specifically stipulated that

each bag shall contain 50 kg. of cement, that the arbitrators exceeded their authority in awarding the amount under this head, that the Division bench had erred in not including the area of the balconies in the measurement of the built-up area since there were no balconies at all as per the modified plan, and that the claim under escalation charges were wrongfully rejected by the Division Bench. The Respondents contested the appeal on the ground that supply of cement was irrespective of variation in weight, that the stipulation in the Tender was not modified by the Appellant's letter, that as regards area covered by balconies, the tender conditions stipulate that it is liable to be excluded from the measurements, that the claim of escalation charges is not admissible under the contract till completion of work and that the arbitrators could not have awarded any amount on this ground.

Allowing the Appeal partly this Court

HELD : 1. Since there is formal contract and the terms of agreement have to be inferred from the Tender notice and the correspondence between parties, and the attempt of the court is always to support the award within the letter of law, the award is upheld as regards variation in cement bags. [90-G]

2. The findings of the Division Bench that the arbitrators overstepped their authority by including the area of the balconies in the measurement of the built up area is upheld. The arbitrators being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. The arbitrators cannot award any amount which is ruled out or prohibited by the terms of the agreement. [91-H, 92-H]

3. The decision of Division Bench as regards rejection of escalation charges is affirmed. The Single Judge was not right in holding that the prohibition of claiming escalation charges is confined to the original contract period and does not operate thereafter. It is not a case of the arbitrators construing the agreement. It is a clear case of the arbitrators acting contrary to the specific stipulation/condition contained in the agreement between the parties. [92-D-H]

Sudharshan Trading Company v. Govt. of Kerala, AIR (1989) SC 890, relied on.

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 808 of 1997.

From the Judgment and Order dated 1.8.96 of the Bombay High Court in A. No. 913 of 1994.

B F.S. Nariman, Gopal Subramaniam, S.K. Gambhir, Vivek Gambhir and Diwakar Chaturvedi for the Appellant.

Ashok H. Desai, Attorney General, R.F. Nariman, Krishnan Venugopal, Ms. Anuradha and R. Sasiprabhu for the Respondent.

C The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. Leave granted. Heard Shri F.S. Nariman, learned counsel for the appellant and the learned Attorney General for the respondent-corporation.

D A contract was entered into between the appellant and the Oil & Natural Gas Corporation (O.N.G.C.), whereunder the appellant undertook to construct 304 pre-fabricated housing units at Panvel, Phase-I. The appellant commenced the construction but did not complete at even within the extended period. The respondent thereupon terminated the contract and got the said work done through another agency. Disputes arose between the parties in the above connection, each party raising claims against the other, which are referred for decision to two arbitrators (joint Arbitrators). By their award dated 18th June, 1991, the arbitrators decided that while the O.N.G.C. shall pay to the appellant a sum of Rs. 1,09,04,789, the appellant shall pay to the O.N.G.C. a sum of Rs. 41,22,178. In other words the appellant was held entitled to a net amount of Rs. 67, 82, 620 with interest at the rate of 18 per cent per annum from the date of award till the date of payment or till the date of decree whichever was earlier. While the appellant applied for making the said award a Rule of the Court, the respondent-corporation filed objections seeking to have the award set aside. The learned Single Judge overruled the objections of the respondent-corporation and made the award a Rule of the Court. Corporation appealed against the same, which has been partly allowed by the Division Bench.

H The appellant had claimed various amounts under as many as 19 heads, while the respondent-corporation claimed certain amounts under

three heads. The arbitrators rejected the appellant's claim under heads 3, 5, 7, 8, 10, 11, 12 and 18. They awarded various amounts under the other heads, the total of which came to Rs. 1,09,04,789. So far as the respondent's claims are concerned, the arbitrators rejected claim No. 2 but accepted claim No. 1 (partly) and claim No. 3 (partly) and awarded various amounts totalling Rs. 41,22,178.

In the appeal before the Division Bench the respondent- corporation confined its attack only to claims 1, 4, 6, 9 and 13. The Division Bench rejected the respondent's contentions with respect to claims 1 and 13 but upheld the same with respect to claims 4, 6 and 9. Only the appellant has come to this Court challenging the Judgment of the Division Bench. We shall deal with these three claims in their proper order.

Claim No. 4 : Appellant's claim No. 4 arises on account of the shortage of cement in the bags supplied by the respondent. The appellant's case was that the corporation had undertaken to supply cement to it in bags, each bag containing 50 kg. of cement, but as a matter of fact, the cement actually found in the bags was less. The appellant complained of the same to the officers of the corporation from time to time and a record of the shortages has indeed been kept by the parties. On this count, the appellant claimed a sum of Rs. 3, 96,984.50 p., against which the arbitrators awarded an amount of Rs. 3,70,221.50 paise. The defence of the corporation was that according to the stipulation contained in Schedule - A to the Tender notice, the corporation was not to be held responsible for any variation in the weight of the cement in the bags supplied by them. The relevant stipulation read as follows :

"Ordinary Port-land construction cement	MT 830	Ex Commission's Godown, Greater Bombay,
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NOTE : 20 (Twenty bags) bags of cement shall mean one metric tonne for the purpose of recovery *irrespective of variation in standard weight of cement filled in bags.*

The appellant's case, however, was that though the Schedule to the Tender notice did contain the above stipulation, the appellant had, in its letter dated 5th March, 1984, which was in the nature of a counter-offer, clearly stipulated that "ordinary portland cement; Rs. 8.30 per metric

A tonne, (each 50 kg. bag)" will be supplied by the corporation "at site". The appellant had stipulated in the said letter that the terms set out by it therein "shall take precedence over..... tender conditions". It is pointed out by Shri Nariman that the said letter forms part of the contract between the parties and that indeed it is this letter which contains the arbitration clause whereunder the disputes between the parties have been adjudicated by the arbitrators. It is further submitted by the learned counsel that in their acceptance letter dated 10th January, 1985, the respondent-corporation merely stated that the cement will be supplied only at Bombay and not at the site, but did not say anything with respect to the stipulation in the appellant's letter dated 5th March, 1984 (counter-offer) that each bag of cement supplied to it shall contain 50 kg. of cement.

The Division Bench has not referred to the letter dated 5th March, 1984 nor to the acceptance letter dated 10th January, 1985, but has rejected the appellant's claim only and exclusively with reference to the stipulation in the schedule to the Tender notice. Mr. F.S. Nariman submits that the Division Bench was in error in holding that the arbitrators exceeded their authority in awarding the said amount. According to him, the arbitrators merely construed the relevant stipulation as contained in the schedule to the Tender notice read with the appellant's letter dated 5th March, 1984 (counter-offer) and the corporation's acceptance letter dated 10th January, 1985 - which they were entitled to do. It is submitted that since the award is a non-speaking award (though it has awarded separate amounts under each head of claim) no interference is permissible on the ground that the arbitrators have misconstrued the terms of the agreement. On the other hand, the learned Attorney General submitted that the stipulation aforesaid in the Tender notice was not modified or qualified in any manner by the appellant's letter dated 5th March, 1984 or by the Respondent's acceptance letter dated 10th January, 1985, and, therefore, the Division Bench was right in rejecting this claim as prohibited by the agreement between the parties. We are of the opinion that this appears to be a borderline case. It is possible to take either view. It must be remembered that in this case *there is no formal contract* and the terms of agreement have to be inferred from the Tender notice and the correspondence between the parties. Since the attempt of the Court should always be to support the award within the letter of law, we are inclined to uphold the award on this count (claim No. 4). Accordingly, we reverse the judgment of the Division Bench to the above extent. The amount awarded by the arbitrators under

this claim is affirmed. A

Claim No. 6: The claim of the appellant under this head is in a sum of Rs. 53,11,735.60p, against which the Arbitrators have awarded an amount of Rs. 49,91,327. The dispute between the parties is with respect to the method/mode of measuring the constructed area. The case of the respondent is that according to the tender conditions, as well as clause (10) of the aforesaid letter dated 5th March, 1984 (written by the appellant to the corporation), the area covered by balconies is liable to be excluded from the measurements. We may refer to clause (10) of the appellant's own letter dated 5th March, 1984 which reads as follows : B

"Mode of measurement : We have based our price on the total built-up area of one floor (four flats) including stair- case and common corridor but excluding balconies only. Hence work should be measured on the built-up area, excluding balcony areas." C

The tender condition is to the same effect. D

The above stipulation clearly says that total built-up area of a floor shall include stair case and common corridor but shall exclude balconies. It expressly provides that "work should be measured on the built-up area excluding balcony area". It is undisputed that in the plan of flats attached to the Tender notice, balconies are provided. Shri Nariman contended that the said plans were modified later and that the flats as finally constructed, did not have any balconies and, hence, no question of excluding the balconies' area can arise. Shri Nariman could not, however, bring to our notice any agreed or sanctioned plan modifying the plan attached to the Tender notice. The appellant could not have constructed flats except in accordance with the plans attached to the Tender notice, unless of course there was a later mutually agreed modified plan - and there is none in this case. We cannot, therefore, entertain the contention at this stage that there are no balconies at all in the flats constructed and that, therefore, the aforesaid stipulation has no relevance. We must proceed on the assumption that the plans attached to the Tender notice are the agreed plans and that construction has been made according to them and that in the light of the agreed stipulation referred to above, the areas covered by balconies should be excluded. In this view of the matter we agree with the Division Bench that the arbitrators over-stepped their authority by including the area of the balconies in the measurement of the built-up area. It is exiomatic that E F G H

A the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account. We, therefore, affirm the decision of the Division Bench on this score (Claim No. 6).

C *Claim No. 9:* The appellant claimed an amount of Rs. 32,21,099.89p. under this head, against which the arbitrators have awarded a sum of Rs.16,31,425. The above claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. The appellant's claim on this account was resisted by the respondent-corporation with reference to and on the basis of the stipulation in the corporations' acceptance letter dated 10th January, 1985 which stated clearly that "*the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work*". The Division Bench has held, and in our opinion rightly, that in the face of the said express stipulation between the parties, the appellant could not have claimed any amount on account of escalation in the cost of construction carried on by him after the expiry of the original contract period. The aforesaid stipulation provides clearly that there shall be no escalation *on any ground whatsoever* and the said prohibition is effective *till the completion of the work*. The learned arbitrators, could not therefore have awarded any amount on the ground that the appellant must have incurred extra expense in carrying out the construction after the expiry of the original contract period. The aforesaid stipulation between the parties is binding upon them both and the arbitrators. We are of the opinion that the learned single Judge was not right in holding that the said prohibition is confined to the original contract period and does not operate thereafter. Merely because the time was made the essence of the contract and the work was contemplated to be completed within 15 months, it does not follow that the aforesaid stipulation was confined to the original contract period. This is not a case of the arbitrators construing the agreement. It is a clear case of the arbitrators acting contrary to the specific stipulation/condition contained in the agreement between the parties. We, therefore, affirm the

decision of the Division Bench on this court as well (Claim No. 9).

A

So far as the position of law on the subject is concerned, there is hardly any dispute between the parties. It is sufficient to refer to the well considered decision of this Court in *Sudarshan Trading Company v. Government of Kerala*, A.I.R. (1989) S.C. 890, wherein it has been held :
"..... if the parties set limits to action by the arbitrator, then the arbitrator had to follow the limits set for him and the court can find that he exceeded his jurisdiction on proof of such excess. Therefore, it appears to us that there are two different and distinct grounds involved in many of the cases. One is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award".

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For the above reasons, the appeal is allowed in part, i.e., to the extent of claim No. 4 (in a sum of Rs. 3,70,221.50). In other respects, the appeal is dismissed. There shall be no order as to costs.

D

V.M.

Appeal partly allowed.