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M/S. CONTINENTAL CONSTRUCTION LTD.

v.

STATE OF U.P.

SEPTEMBER 22, 2003

B

[V.N. KHARE, CJ. AND S.B. SINHA, J.]

C

*Arbitration Act, 1940—Sections 9, 30 and 33—Dispute as regards claim for supply of extra earth and rock by the appellant referred for arbitration—A portion of the claim was allowed by the Umpire by a non-speaking award on the basis of a admission by the respondent—Civil Judge allowed the objections to the application for making the awards a rule of the Court—High Court upheld order setting aside the awards—On appeal Held, awards were justified as they were made on the basis of admissions having regard to documents on record and decision of the High Court in a matter between same parties—Such admissions not questioned by the respondent and only a vague statement denying the claim was made—Also, the Umpire did not travel beyond the contract.*

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*Section 30—Jurisdiction of a Court—Limited Jurisdiction while adjudicating upon an objection to an award—No interference except where arbitrator has misconducted himself or the proceeding or there exists an error apparent on the face of the award.*

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**Disputes and differences arose between the parties as regards the claim for extra earth and rock supplied by the appellant. These were referred to arbitration. The respondent did not appoint any arbitrator and so the appellant requested the arbitrator appointed by it to proceed in the matter. The respondent filed an application under Sections 33 and 9 of the Arbitration Act, 1940 before the District Judge, which was allowed. The High Court, in appeal, directed both parties to appoint arbitrators. However, no award could be made within the statutory period and the matter was referred to the umpire in accordance with the arbitration agreement. The Umpire awarded a sum of Rs.7,29,764.00 in respect of the claim for extra quantity of earthfill and a sum of Rs. 8,74,256,00 in respect of the claim for rockfill by a non-speaking award. The respondent filed objections under Section 30 of the Act to the application for making the awards a rule**

of the Court. The Civil Judge allowed the application and set aside the awards. The appeals were dismissed by the High Court on the ground that as per the contract the appellant was not entitled to make any extra claim for supply of earth or rock. Hence this appeal. A

The appellant contended that the question regarding entitlement for an extra claim had already been considered by the High Court in a matter between the same parties, wherein such a claim was held maintainable; that the courts below were not justified in entering into the merits of the matter as a non-speaking award had been passed; that the courts below ought not to have interfered with the awards in absence of any finding to the effect that the same were perverse as the arbitrator had jurisdiction to construe the contract independently; that the respondent had admitted the entitlement of the extra claim before the Umpire and only then the awards were passed; and that the Umpire had only awarded a portion of the total claims of the appellant. B C D

The respondent contended that the Umpire was bound by the terms of the contract and could not have travelled beyond the same and that an affidavit having the effect of not admitting any claim of the appellant was filed before the Civil Judge. D

Allowing the appeals, the Court E

HELD : 1. A bare perusal of the awards clearly shows that the respondent admitted a part of the claim of the appellant, which in turn was accepted by the Umpire. Such an admission presumably was made having regard to the documents on record and also decisions of the High Court in the matter between the same parties. The admission was not questioned by the respondent and a vague statement was made denying the claim, while dealing with the question as to whether the award have been a reasoned one or not. It is not borne out from the records that no such admission was made. [1008-A-C] F G

2. The Umpire was required to adjudicate upon the claim of the appellant and for that purpose he was required to take into consideration the terms and conditions of contract *vis-a-vis* the conduct of the parties. It is not a case where he travelled beyond the contract. The matter relating to construction of the contract and/or application thereof fell H

**A** for consideration before the arbitrators, therefore, the matter was clearly within the jurisdiction of the Umpire. [1008-E, F]

**B** 3: The Court while exercising its jurisdiction under Section 30 of the Act can interfere with the award only in the event the arbitrator has misconducted himself or the proceeding or there exists an error apparent on the face of the award. The Umpire was not found to have acted arbitrarily, irrationally, capriciously or independent of the contract or made conscious disregard of the contract, which was manifest on the face of the award. [1008-G, H, 1009-A]

**C** 4. The Court exercises a very limited jurisdiction while adjudicating upon an objection to an award in terms of Section 30 of the Act. In the instant case, the Umpire merely set out the claims and awarded certain amounts. While passing the non-speaking award, he did not disclose his mind indicating as to why he had done so or what was done.

**D** The courts below could not interfere with the award merely on *ipse dixit*. [1009-B, C]

*State of U.P. v. Allied Construction, (2003) 6 SCALE 265, followed.*

**E** *M/s. Sudarshan Trading Co. v. Government of Kerala & Anr., [1989] 2 SCC 38, relied on*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8431 of 1997.

**F** From the Judgment and Order dated 3.4.97 of the Allahabad High Court in F.A.F.O. No. 929 of 1995.

WITH

**G** C.A. No. 8453 of 1997.

Shiv Kumar Suri for the Appellant.

Subodh Markandeya and Ashok K. Srivastava for the Respondent.

**H** The Judgment of the Court was delivered by

**S.B. SINHA, J. :** These two appeals involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment. **A**

*FACTS:*

The parties hereto entered into a contract dated 20th August, 1964 for the purpose of construction of Obra dam, Power house, structures and appurtenant works. Disputes and differences having arisen between the parties as regard supply of extra quantity of earth and rock, the matter was referred to an arbitrator. **B**

As far back as on 23.8.1972, the appellant herein invoked the arbitration agreement contained in Clause 17 of the contract in connection with earthfill and rockfill which was recorded from 53rd running bill upto the 88th running bill. One Shri J.S. Pujji was appointed as an arbitrator by the appellant. As the respondent did not appoint any arbitrator the appellant requested the said arbitrator to proceed in the matter as a sole arbitrator whereupon he entered into a reference. The respondent herein filed application before the Court of District Judge purported to be in terms of Sections 33 and 9 of the Arbitration Act, 1940 which was allowed. Being aggrieved by and dissatisfied with the judgment of the District Judge, the appellant filed appeal before the High Court of Allahabad. The High Court by an order dated 17.4.1980 directed that both the contractor and the State Government shall nominate their respective arbitrators for resolving the disputes with regard to the claim for extra charges for earth and rock work made by the contractor for the period subsequent to 28.12.1967 and 15.6.1968 respectively. The parties thereafter filed their respective statements of claim, statements of defence and replications before the arbitrators. However, no award could be made by the learned arbitrator within the statutory period as the disputes and differences were referred to the Umpire in accordance with the arbitration agreement. **C**  
**D**  
**E**  
**F**

The Umpire was appointed by the Court of Civil Judge, Sonebhadra with the consent of the parties. **G**

The appellant herein filed a statement of claim for a sum of Rs. 43,50,958.48 on extra quantity of 8,45,319.471 cu. m. of earthfill **H**

A excavated from the external sources obtained from borrow areas at the rate of Rs. 880.91 per 100 cu.m. It also made a claim of Rs. 26,47,746.34 for extra quantity of 1,66,524.927 cu.m. of rock excavated from the external sources/quarries at the rate of Rs. 1590 per 100 cu.m. The Umpire appointed for determination of disputes between the parties who was a retired Engineer-in-chief of the respondent herein awarded a sum of Rs. 7,29,764.00 in respect of the claim for extra quantity of earthfill and a sum of Rs. 8,74,256.00 in relation to its claim for rockfill. The appellatant herein filed applications for making the said awards as rule of the Court. Respondent, however, filed objections thereto in terms of Section 30 of the Arbitration Act, 1940. By reason of an order dated 23.8.1995 the said applications of the respondent were allowed and the awards were set aside by the Civil Judge, (Senior Division) Mirzapur. The appellatant herein preferred appeals thereagainst which were dismissed by the High Court *inter alia* on the ground that in terms of the provisions of the contract the appellatant herein could not make any extra claim for supply of earth or rock.

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#### SUBMISSIONS:

Mr. Shiv Kumar Suri, the learned counsel appearing on behalf of the appellatant would *inter alia* submit that the question as to whether the claim as regards extra item of earth and rock work can be claimed or was not considered by the Allahabad High Court in FAFO No. 155 of 1975 (*M/s. Continental Construction (P.) Ltd. v. State of Uttar Pradesh and Others*) disposed of on 17th April, 1980 holding that such claim is maintainable. It was contended that the award being a non-speaking one, the learned Civil Judge, Mirzapur and the High Court must be held to have acted illegally and without jurisdiction in entering into the merit of the matter. The learned counsel would urge that the arbitrator had the requisite jurisdiction to construe the contract independently and in absence of any finding to the effect that the awards *ex facie* were perverse, the same could not have been set aside by reason of the impugned judgments.

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Our attention has been drawn to the fact that even before the Umpire the respondent admitted that the appellatant herein is entitled for the extra items of admitted total quantity of earth and rock to the extent of 8,45,319.471 cu.m. and 1,66,524.927 cu.m. respectively and only in terms of such admission the awards have been passed.

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The learned counsel would contend that from the awards it would appear that although the claims of the appellant were for a sum of Rs. 43,50,958.48 and Rs. 26,47,746.34; the learned Umpire awarded only a sum of Rs. 7,29,764.00 and Rs. 8,74,256.00 in its favour. A

Mr. Subodh Markandeya, learned senior counsel appearing on behalf of the respondents, on the other hand, would submit that the umpire was bound by the terms of the contract and could not have travelled beyond the same. The learned counsel would contend that before the Civil Judge, Mirzapur an affidavit was filed to the effect that the Department has not admitted any claim of the opposite party. In support of the said contention, the learned counsel has produced before us the affidavit of one Shri Uma Nath Misra filed in Case No. 91 of 1993 and 92 of 1993 in the Court of Civil Judge, Mirzapur. B C

*FINDINGS:*

There is no dispute that there existed an arbitration agreement between the parties as would appear from the fact of the matter, as referred to hereinbefore, that the learned umpire passed a non-speaking award. D

The Umpire in his award has recorded: E

“Claim No. 1 amounting to Rs. 43,50,958.48 (plus interest and costs) on account of the work of earthfill in Dam Embankment from the 53rd running bill upto the 88th running bill, involving a quantity of 10,33,702.306 cu.m. of earthfill with earth obtained from borrow area. Against the said quantity, the Respondents admitted the quantity of 8,45,319.471 cu.m. for this claim and this was accepted by the Claimants. The Claimants have claimed a rate of Rs. 420.91 per 100 cu.m. over and above the rate of Rs. 460.00 per 100 cu.m. provided in item No. 64 of the schedule, and have furnished analysis of rates for earthfill in Dam Embankment after borrowing material from borrow areas and sources other than the excavations of the Dam, Power House, Spillway, Approach and Tail Race Channels. Against this, I award Rs. 7,29,764.00 (Rs. Seven lacs twenty nine thousand, seven hundred and sixty four) only.” F G H

A A similar award has been passed in respect of claim of the appellant relating to rock fill. A bare perusal of the said awards would clearly go to show that the respondent herein admitted a part of the claim of the appellant which in turn was accepted by it.

B Such an admission presumably was made having regard to the documents which were filed by the parties before the Umpire as also decisions of the Allahabad High Court in FAFO No. 155 of 1975. The respondent did not raise any question as regard the said admission of part of the quantity of earth fill and rock fill before the Umpire. A vague statement was made that the claim of the appellant was not admitted while dealing with the question as to whether the award should have been a reasoned one or not. The submission that no such admission is made is not borne out from the records. On the other hand, such admission must have been made in view of the documents maintained by the respondent as otherwise the exact figure of earthfill or rockfill was not possible to be mentioned in the awards.

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E In view of the order of the High Court dated 17.4.1980 the Umpire was required to adjudicate upon the claim of the appellant. For the said purpose he was required to take into consideration the terms and conditions of contract *vis-a-vis* the conduct of the parties. It is not a case where the learned Umpire has travelled beyond the contract.

F The matter relating to construction of the contract and/ or application thereof fell for consideration before the arbitrators. According to the appellant, the work in question did not fall within the purview of the excepted matter. Determination of the said question was, thus, clearly within the jurisdiction of the Umpire.

G The award is a non-speaking one. It is trite that the Court while exercising its jurisdiction under Section 30 of the Arbitration Act, 1940 can interfere with the award only in the event the arbitrator has misconducted himself or the proceeding or there exists an error apparent on the face of the award.

H The learned Civil Judge and the High Court have not found that the Umpire acted arbitrarily, irrationally, capriciously or independent of the

contract. No finding has been arrived at that the Umpire has made conscious disregard of the contract which was manifest on the face of the award. A

The court exercises a very limited jurisdiction while adjudicating upon an objection to the award in terms of Section 30 of the Arbitration Act, 1940. B

In the instant case, the Umpire has merely set out the claims, given the history of the claims and awarded certain amount. He has not disclosed his mind indicating as to why he had done so or what was done. The Courts, therefore, could not interfere with the award merely on *ipse dixit*. C

In *M/s. Sudarsan Trading Co. v. Government of Kerala and Anr.*, [1989] 2 SCC 38 this Court has laid down the law in the following terms:

“But, in the instant case the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decision, the arbitrator had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the arbitrator in this case. 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. It has to be determined that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy.” D E F G

The question again came up for consideration before a three-Judge Bench of this Court recently in *State of U.P. v. Allied Constructions* [2003] 6 SCALE 265. This Court held:

“Any award made by an arbitrator can be set aside only if one H

A or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein.(sic) It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see *M/s. Sudarsan Trading Co. v. The Government of Kerala*, AIR (1989) SC 890. Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. As error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering.”

The aforementioned decisions constitute binding precedents.

F For the reasons aforementioned, we are of the opinion that the impugned judgments cannot be sustained. The impugned judgments are, therefore, set aside. The awards made by the learned Umpire are directed to be made rule of court. These appeals are allowed accordingly. No costs.

G A.Q. Appeals allowed.