Puri Construction Pvt. Ltd. vs Union Of India (Uoi) on 20 January, 1989

Equivalent citations: AIR1989SC777, 1989(1)ARBLR306(SC), JT1989(1)SC132, 1989(1)SCALE126, (1989)1SCC411, 1989(1)UJ416(SC), AIR 1989 SUPREME COURT 777, 1989 (1) SCC 411, (1989) 1 DRJ 285, 1989 RAJLR 95, 1989 (16) DRJ 285, (1989) 1 JT 132 (SC), (1989) 1 ARBI L.R. 306, (1989) 1 CURCC 329, (1989) 37 DLT 353

Bench: K.N. Singh, L.M. Sharma

JUDGMENT

Sharma, J.

1. This appeal by special leave is directed against the judgment dated 31.5.1984 of a Division Bench of Delhi High Court passed in an arbitration matter. Several disputes between the appellant and the respondent arose out of a contract for execution of certain works which were, under the orders of a learned Single Judge of the Delhi High Court, referred for arbitration to a sole arbitrator, who gave an award directing the respondent to pay a sum of over 64 lacs of rupees to the appellant. A learned Single Judge of the Delhi High Court made the award rule of the court. The Union of India filed an appeal which was registered as F.A.O. (O.S.) 67 of 1982 and was partly allowed by the Division Bench of the High Court.

2. The Government of India decided to hold a trade fair to be known as Third Asian International Trade Fair, scheduled to be opened in November 1972. More than a hundred countries from the different parts of the world, invited to participate in the Fair, were assured of getting space, by the first week of October, 1972, in two huge structures named as Hall of Nations and Hall of Industries, so that they could in time furnish their exhibits with proper lighting and other infrastructure It was decided to entrust the construction of Hall of Nations and Hall of Industries through contractors and accordingly tenders were invited on 9.10.1971 by an open advertisement described by the parties as Notice Inviting Tenders (NIT in short). The appellant, Puri Construction (Pvt.) Ltd. (hereinafter referred to as the contractor), submitted its tender and was allotted the work. The contractor completed the work within the stipulated period and the Fair opened in time The parties, however, disagreed as to the amount payable for the executed work and they seriously differed even about the terms relating to arbitration. According to the contractor, the arbitration matter was entirely governed by the Provisions of the Indian Arbitration Act, 1940, while it was asserted on behalf of the Union of India that it was only the Chief Engineer who was authorised to appoint a sole arbitrator under Clause 25 of the contractor (NIT) on receipt of a formal request by a party. The contractor filed before the Delhi High Court an application under Section 20 of the Arbitration Act

on 30 5 1974 which was registered as Suit No. 329-A of 1974. By consent 'of the parties the High Court on 17-2-1975 referred the dispute to Sri M.K. Shivasubramaniam, Chief Engineer, Central Public Works Department, to act as the sole arbitrator. The suit was accordingly disposed of.

3. Only after a few days of hearing, Sri Shivasubramaniam was appointed as the Chief Engineer (Vigilance Cell) and could not thereafter proceed with the arbitration. The respondent, then purported to appoint one Sri M.K. Koundinya as the sole arbitrator. The appellant contractor challenged the authority of Sri Koundinya by filing a miscellaneous petition in the High Court. Ultimately on 12 4 1979 Yogeshwar Dayal, J. (as he then was) appointed, as jointly suggested by learned counsel for the parties, Sri D.N. Endlaw, retired Chief Engineer, C.P.W.D. the sole arbitrator to continue with the arbitration proceeding. The dispute included mainly the claim of the contractor and several counter-claims by the Union of India. After a protracted hearing, Sri Endlaw made a non-speaking award and filed it in court on 29.5.1981. A case being Suit No. 551/A/81 was registered and notices were issued; and, the Union of India filed objections thereto. The case was disposed of by a judgment dated April 16 1982 passed by G.K. Luthra, J. dismissing the objections and accepting the award. The Union of India challenged the judgment in appeal which was heard and disposed of by a Division Bench consisting of Rajinder Sachar and Jagdish Chandra, JJ. The present appeal is directed against their judgment.

4. As stated earlier, Sri Endlaw did not give reasons in support of his award, and the parties seriously differed on the question whether Sri Endlaw was under a duty to give reasons. According to the appellants case, the case was governed by the general rules applicable to arbitration and Sri Endlaw was, therefore, not obliged to support his decision by reasons. The Union of India contended that in view of the special provisions in the NIT, which was binding on the parties requiring the arbitrator to give a speaking award, Sri Endlaw was bound to do so. The learned Single Judge agreed with the appellant contractor. In appeal, before the Division Bench this issue again was hotly debated and on the suggestion of the Bench, the arbitrator appeared and informed the court that he had kept detailed notes of the proceedings with him and if some time was allowed he could indicate his reasons for the award. While reserving its right to press its objections later, the contractor agreed to the course suggested. Accordingly the award was sent to Sri Endlaw for the limited purpose of indicating reasons. On 28.2.1983 the award along with reasons therefor was received from Sri Endlaw. The parties filed further written statements The appeal was thereafter disposed of by the impugned judgment.

5. The dispute before the arbitrator covered a large number of claims and counter-claims but the parties before us have confined the present appeal to only a number of items, and in that view, their cases with respect to the other claims need not be stated. For appreciating the respective cases of the parties in respect of the disputed items it will be necessary to briefly state the nature of the work entrusted to the contractor to be executed.

6. The authorities concerned had taken a decision to have what is described by the parties as "space frame structures" constructed for housing the Hall of Nations and the Hall of Industries, and it has been asserted on behalf of the appellant that it was the first venture to construct "space frame structure in exposed concrete" in India. Relying on certain evidence led before the arbitrator, Mr.

Kapil Sibal, learned counsel for the appellant, has further claimed by saying that it was a new venture in the field of architecture not only for this country but for the whole of the world. The result, therefore, was that till the contract work was allotted to the appellant no detailed drawings were available from the architects, and when the work was actually entrusted to the appellant, they were still struggling for evolving a design for suitable "space frame structure", which could be stable with all the various loading and other structural considerations. At that stage they were running a computer programme at Indian Institute of Technology Kanpur, for the purpose of verifying and establishing the suitability of the proposed structure. Mr. Sibal referred to the statements made on behalf of the Union of India before the arbitrator to the effect that the sequence of construction indicated in the work, was mainly for prefabricated construction which went into a lot of changes based on the actual results of the computer programmes and subsequent detailed structural designs made available during the period the work at site was actually going on. Normally the structural drawings should have been ready before the work was entrusted, but as the time was short, the designs, which took considerable time for finalisation, due to necessary experimentation and adoption of trial and error technique, were available only later. Vital modifications, therefore, became necessary and the contractor had to execute many items of work not included in the original contract. The original value of the contract was assessed at Rs. 91,57,201/-, only but due to the changes the estimated cost even according to the Union of India jumped to 1.53 crore rupees. In view of the stand taken by the parties in the court below and before us, it does not appear necessary to deal with this aspect as it is not denied on behalf of the respondents that the appellant had to execute many new items of work, as directed from time to time during the course of construction, and is accordingly entitled to additional payment. The difference arises in respect of the details. The position may be explained with reference to a major item claiming for "permanent steel staging". At the time the contract work was given to the appellant, it was intended to put up prefabricated structures, but later what was built in accordance with the changed directions has been described as "cast-in situ", for which a permanent steel staging became necessary. Without going into the technical meanings of these expressions it may be sufficient for the purpose of this appeal to state that as a result of this change it became necessary to use huge quantities of additional steel for a continuous period of about 9 months after which they had to be discarded. The discarded surplus steel was, thus, available to the appellant-contractor for resale. Naturally the amount payable to the contractor had to be reduced by the value of this discarded additional steel described by the parties as 'salvaged steel'. The arbitrator valued the salvaged steel at the rate of Rs. 600/- per metric tonne but the High Court has held that it ought to have been calculated at the rate of Rs. 1,250/- per metric tonne. The contractor's claim under this court has been described as Claim No. 21 with reference to the Hall of Nations and Claim No. 63 in relation to the Hall of Industries. The High Court as also the learned counsel for the parties appearing before us have referred to this item collectively as Claim No. 21/63. The other items with respect to which arguments have been addressed before us are Claim No. 22/64, Claim No. 26/67, Claim No. 27/66, Claim No. 39/80, Claim No. 16 and Interest allowed by the arbitrator. Let us now consider them item-wise.

7. Referring to the objection of the Union of India filed before the arbitrator to claim No. 21 of the contractor, Mr. Sibal contended that no objection was taken at all to the re-sale value of the salvaged steel. It was pleaded on behalf of the respondent that this item must be deemed to be included in the work originally allotted and no extra payment could be allowed. This objection, however, was

rejected by the arbitrator as also by the High Court and since there is no appeal filed on behalf of the respondent and the plea has not been pressed before us, the point stands concluded. The objection petition was referred to by Mr. Sibal for the purpose of his argument that there was no denial to the re-sale value of the salvaged steel as mentioned in the contractor's claim and it was, therefore, not open to the High Court to go into the additional argument belatedly addressed by the Union of India. The learned counsel further supported the decision of the arbitrator on merits, by reference to the evidence available before the arbitrator. The arbitrator who was a retired Chief Engineer of the respondent held that value of the salvaged steel was approximately half the price of the new steel. According to the contractor the price of the new steel was Rs. 900/- per metric tonne while the respondent claimed that it was Rs. 1400/- per metric tonne. The arbitrator held that the rate varied between Rs. 1100/- to Rs. 1200/-, per metric tonne and taking the higher figure of Rs. 1200/-, the arbitrator held that the salvaged steel should be valued at the rate of Rs. 500/- per metric tonne, and the amount payable to the contractor should be reduced accordingly. The Union of India examined its Executive Engineer, Sri M.L. Wadhwa, as one of the witnesses before the arbitrator and he in his evidence expressly stated thus :

> The market inquiry was made by the site staff for the sale of dismantled steel and was assessed at Rs. 700/- per M.T. Which was adopted in the analysis finally approved.

> The High Court while dealing with this item referred to the Bill of the appellant mentioning the rate of "staged steel" at Rs. 2,553.98 per metric tonne and on that basis held that the contractor's claim ought to have been reduced by the arbitrator for the salvaged steel at that rate. It was pointed out by Mr. Sibal that the aforementioned claim in the Bill was not accepted by the arbitrator and the award could not be characterised as inconsistent on that basis. Relying upon Sri Wadhwa's statement, it was urged that while the Union of India itself led evidence to show the salvaged value at Rs. 700/- per metric tonne, the High Court was in gross error in allowing the higher rate of Rs. 1250/- per metric tonne. It was further pointed out that in its statement before the arbitrator there was no reply on behalf of the Union of India at all to the corresponding Claim No. 63 with reference to the Hall of Industries. Mr. M.M. Abdul Khader, learned counsel for the respondent, could not point out any acceptable material in support of the finding of the High Court, except relying on the judgment itself. With respect to Claim No. 63 he said that since it was similar to Claim No. 21, the objections raised to Claim No. 21 should be read to apply to Claim No. 63 also. Even on accepting the suggestion and interpreting the objection petition of the respondent liberally, the decision of the High Court cannot be maintained. When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits. However, so far as the present case is concerned, the decision of the arbitrator is supported by the evidence led before him including the evidence of the Union of India, and appears to be correct on merits also.

8. Claim 22/64 refers to the payment demanded for additional platform of steel channels and Kail wood set up for Staging. Learned counsel for the respondent argued that this work was connected with Staging and since Staging was included in the work entrusted to the contractor, no additional amount could be legitimately claimed. He referred to Clause 18 of the contract which reads as follows :

> The contractor shall supply and provide at his own cost all materials (except such special materials, if any, as may in accordance with the contract be supplied from the Engineer-in-Charge's store), plan, tools, appliances, implements, ladders, cordage, tackle scaffolding and temporary works requisite or proper for the proper execution of the work whether original, altered or substituted and whether included in the specification or other documents forming part of the contract or referred to in these conditions or not....

Mr. Sibal replied that the objection as formulated later was not taken by the respondent before the arbitrator at all, and could not, therefore be allowed. He placed before us the objection petition dealing with Claim No. 22 and he appears to be right. No separate reply was attempted with reference to Claim No. 64, which was a similar plea for the Hall of Industries. The learned counsel explained that the additional platform had to be set up on account of the subsequent modification in the nature of the work and this was different from the flimsy scaffolding which is put to facilitate the movement of the labour force. Setting up of the additional platform became essential on account of the subsequent directions given by the authorities of the Union of India. Several documents in this regard including Ext. D/12 dated 22.1.1972 (at page 44, Vol. III of the paper book), third item of the letter by the Executive Engineer to the Chief Engineer dated 29.4.1972 (pp 26-28, Vol. III of the paper book) and the letter of the Executive Engineer to the Chief Engineer dated 7.2.1973 (pp 31-36, Vol-III of the paper book) were relied upon, and the learned counsel rightly laid great emphasis on the statement of the Executive Engineer Sri ML. Wadhwa (at page 28, Vol. III of the paper book) justifying the contractor's claim. Similarly the following statement in the last letter (at page 34, Vol. III of the paper book) in the following term also negatives the respondent's contention :

> The very concept of the space frame and the various details for the pipe caps, joints and other members have been experimented as this was a structure first of its kind never attempted earlier. The design was also undergoing changes simultaneously as the structure was being put up. As is clear lot of labour and time were required to manufacture the joint moulds, cut and bend the reinforcement to the required bends and lengths, as also to thread the same through the joints moulds. This was to be done for all levels and the joint moulds were kept supported till the de-staging a level 6-6. Since there was no clear sequence of construction given in the begining, it was the process of evolution that was reigning supreme.

9. It was also urged on behalf of the Union of India before the High Court that if the claim of the contractor was allowed on the aforesaid items, that is Claim 22/64, the profit should not exceed 10% on the amount. As the claim itself was denied by the High Court, no occasion for the percentage of profit arose for decision. We do not find any reason for accepting the suggestion of the respondent about limiting the profit to 0%. The impugned decision of the High Court on Claim 22/64, in the circumstances, appears to be incorrect.

10. Similarly the plea belatedly taken on behalf of the respondent in regard to Claim No. 16 also has to be rejected. No such objection to the award was taken before the learned Single Judge. It was never suggested on behalf of the respondent that centring and shuttering were part of Staging and thus included in the original work.

11. With respect to the Claim No. 39/80, Mr. Sibal said that the High Court wrongly assumed that the worked out details or the analysis submitted by the Executive Engineer in support of the rates proposed by him were not before the arbitrator and the latter had no basis for referring to the details. It was asserted that these documents were before the arbitrator and this fact was in the knowledge of the parties. Reliance was placed on the arbitrator's Minutes of the 82nd hearing dated 15.11.1980 in the proceedings before him (pp. 73-85, Vol. III of the paper book). The details mentioned in these minute were available from the relevant documents which were certainly filed in the proceedings; The appellant has stated the facts in the special leave petition before this Court and in the argument mentioned at some length under ground No. VIII (pp 224-228, Vol. I of the paper book), and no counter affidavit in denial has been filed We therefore, accept the appellant's contention.

12. So far as Claims No. 26/67 and 27/66 were concerned, again no objection on behalf of the respondent was taken. There is also an important circumstance showing that the Union of India did not contemplate the objections pressed later with reference to claims No. 66 and 67. After the award was returned to the High Court by the arbitrator with his reasons the matter was placed before' the Division Bench (the earlier Bench and not the Bench which ultimately decided the appeal). The orders of the Bench dated 27.4.1983 and 20.5.1983, shown at Sl. No. 66 and Sl. No. 57 in the "List of Material Dates and Events" filed along with the paper book, are illuminating and they read as follows :

> We are informed that objections have been filed by the Union of India and reply alo. Now time is granted to file a rejoinder by 16th May 1983. It is further stated that some part of the award is not challenged now. So some interim order may be passed This case may be listed on 9th May, 1988 for orders regarding the uncontested portion of the award and other cirections ...On this assumption we have to determine what is the uncontested part of the award. Although, the award is for a very large sum, i.e., Rs. 64,18,000/- together with simple interest at nine per cent calculated from 30th May, 1974, we find that no objections are filed regarding an awarded amount of Rs. 8,85,759.63. These figures are based on those admitted by learned counsel for the Union of India. Interest has also been calculated on this amount to be Rs. 6,55,019.17 up to 10th May, 1983. We, therefore, have to see whether we can give

relief regarding this sum of Rs. 15,40,778.70.

...It is submitted by learned counsel for the contractor that a huge extra expenditure was involved in doing work on this contract which has led to huge losses for the contractor which have been met by taking loans etc. We are told that the contractor is heavily indebted to its Bankers and has to pay heavy interest. We think that this is a case where it is just and necessary that at least the uncontested part of the award is executed.

We accordingly pass an interim direction that the sum of Rs. 15,40,778.70 be paid to the contractor with a reasonable time. Whatever else is found due to either party will have to be decided at the time of the final judgment in respect of the remaining or contested part of the award.

The amounts allowed for claims No. 66 and 67 were included in the uncontested part of the award, mentioned in the orders quoted above and the Union of India had not till that stage thought of the objections raised by the contractor. Mr. Khader was not able to suggest any acceptable answer to the arguments addressed on behalf of the appellant. Dealing with the question whether the contractor should have been allowed a profit at the rate of 20% or 10%, Mr. Khader accepted that the High Court was not right in referring to the Delhi rates in this regard. He suggested that the High Court must have the analysis of rate in its contemplation and Delhi rates were mentioned in the judgment inadvertantly.

13. Although Mr. Sibal relied upon various other parts of the records, we do not think it necessary to consider the merits of the claim, in further detail, specially because no detailed reply was attempted on behalf of the respondent. Besides, a court while examining the objections taken to an award filed by an arbitrator is not required to examine the correctness of the claim on merits. The scope is very limited and none of the points which can be entertained has been substantiated by the objector-respondent. Mr. Sibal dealt with the merits of the claim, as he put it, only for satisfying the conscience of the Court that the award was fair. He went to the length of saying that actually by refusing further relief to which the contractor is entitled to (which will be dealt with hereafter), the arbitrator acted very strictly in allowing the claims.

14. It is significant to note that there has been no suggestion on behalf of the Union of India either in the High Court of here that the integrity of the arbitrator could be doubted. Admittedly he was (now he is dead) a highly respectable retired Chief Engineer. So far as the quality of the work done by the contractor is concerned, it was to the full satisfaction of the respondent. Although it was necessary to have the work completed quickly within nine months so that the Trade Fair could open in time, this was done in spite of the fact that the construction work had to start even before the engineers of the Central Government could finalise the engineering designs. The Chief Engineer of the Trade Fair Sri Durai Raj was admittedly awarded Padma Shree and the Executive Engineer and the Assistant Engineers Gold Medals and certificates of merit for the successful satisfactory completion of the work within time. The arbitrator, Mr. Endlaw, has mainly relied on the statements of these

Engineers. Mr. Sibal, therefore, appears to be right that apart from the fact that the award is not vulnerable to any objection which can be entertained under the Arbitration Act, it is a fair one. But this does not lead to the conclusion that for upholding an award the court has to examine the merits of the award with reference to the materials produced before the arbitrator. The court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the materials. The scope for setting aside an award is limited to the grounds available under the Arbitration Act, which have been well defined by a long line of decided cases, and none of them is available here. For this reason the decision of the Division Bench of the High Court has to be set aside.

15. On behalf of the appellant Mr. Sibal pressed the contractor's objection to the award with respect to Counter-Claim No. 3. On account of the change in the design, it became necessary to resort to welding at places in the structures referred to as joints instead of using binding wires. The contractor was, therefore, entitled to additional payment. The learned counsel criticised the award by saying that the rate allowed by the arbitrator was far less than the market rate, and the difference in the amounts would be very large. It was suggested that since the arbitrator is now dead a fresh arbitrator may be appointed by this Court for deciding the claim on this item. We are afraid, for the reasons as indicated earlier, it is not open to the Court to examine the correctness of the award on a re-appraisal of the evidence. Further the records also show that at one stage the contractor had indicated its willingness to execute the welding work at the lower rate. The learned counsel for the appellant attempted to meet this aspect by saying that this offer was withdrawn. However, Mr. Sibal himself, in the course of his argument, while dealing with the other items, rightly pointed out that the arbitrator was a highly qualified Engineer, fully conversant with the nature of the work and should be presumed to correctly evaluate the additional work done. For similar reasons the contractor's claim for higher rate of interest has been to be rejected.

16. Mr. Khadar, the learned counsel for the respondent, contended that the arbitrator erred in law in allowing interest at 9% per annum. Reliance was placed on Executive Engineer (Irrigation), Balimela and Ors. v. Abhaduta Jena and Ors. : . In reply Mr. Sibal relied on certain observations in paragraph 4 of the reported judgment. We do not consider it necessary to deal with this point as the Union of India has not filed any appeal. The learned counsel suggested that since the award becomes a decree under Section 17 of the Arbitration Act, it can be corrected in appropriate cases even without an appeal in view of the provisions of Order XLI, Rule 33, CPC. He also said that an erroneous award can be corrected even suo motu under inherent powers. Assuming that it can be so done, we do not consider it an appropriate case specially because the Union of India did not contest before the Division Bench of the High Court several parts of the award which included interest on many items. The orders No. 56 and 57, mentioned in paragraph 12 of this judgment, are relevant in this regard.

17. For the reasons mentioned above, the High Court judgment dated May 21, 1984 passed in F.A.O. (O.S.) 67 of 1982 is set aside, and the judgment dated 16.4.1982 passed by the learned Single Judge in Suit No. 551-A of 1981 is restored. The appeal is allowed with costs.