The New India Civil Erectors(P) Ltd vs Oil & Natural Gas Corporation on 17 February, 1997

Equivalent citations: AIR 1997 SUPREME COURT 980, 1997 (11) SCC 75, 1997 AIR SCW 941, (1997) 2 JT 633 (SC), (1997) 2 SCR 86 (SC), 1997 (2) SCR 86, 1997 (2) SCALE 176, 1997 (1) ARBI LR 292, (1997) 2 ALL WC 1153, (1997) 1 LJR 465, (1997) 2 SUPREME 265, (1997) 3 RECCIVR 205, (1997) 1 ICC 782, (1997) 2 SCALE 176, (1997) 1 ARBILR 292, (1997) 1 CURCC 316, (1997) 2 MAHLR 444, 1997 (100) BOM LR 97, 1997 BOM LR 2 97

Author: B.P. Jeevan Reddy

Bench: B.P. Jeevan Reddy, Sujata V. Manohar

PETITIONER:
THE NEW INDIA CIVIL ERECTORS(P) LTD.

Vs.

RESPONDENT:
OIL & NATURAL GAS CORPORATION

DATE OF JUDGMENT: 17/02/1997

BENCH:
B.P. JEEVAN REDDY, SUJATA V. MANOHAR

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T 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.

A contract was entered into between the appellant and the Oil & Natural Gas Corporation (O.N.G.C), whereunder the appellant undertook the construct 304 pre-fabricated housing units at Panvel, Phase-I. The appellant commenced the construction but did not complete it even within the extended period. The respondent thereupon terminated the contract and got the said work done through another agency. Disputes arose between parties in the above connection, each party raising claims against the other, which were 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 the other words the appellant was held entitled to a net amount of Rs.67,82,620/- with the 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.

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 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 fabricated housing units at Panvel, Phase- I. The appellant commenced the construction but did not complete it even within the extended period. The respondent thereupon terminated the contract and got the said work done through other agency. Disputes arose between the parties in the above connection, each party raising claims against the other, which was 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. 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 the 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 have been partly allowed by the Division

Bench.

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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 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.3,96,984.50p., 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 M.T. 830/- Ex commission`s Godown, Greater Bombay.

NOTE|- 20 (Twenty bags) bags if 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 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 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 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 modified or qualified in any manner by the appellant's 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 it appears to be border- line 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 the 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.

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:

> "Mode of measurement|- We have based our price on the total build- up area of one floor [four flats] including stair-case and common corridor but excluding balconies only. Hence work should be measured on the build-up area, excluding balcony areas."

The tender condition is to the same effect.

The above stipulation clearly says that total build 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 build-up area excluding balcony area". It is undisputed that in the plan of the flats attached to the Tender notice, balconies were 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 in area of the balconies in the measurement of the build-up area. It is axiomatic that 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 build-up area, the balcony area should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any awarded any amount to the appellant on the account. We, therefore, affirm the decision of the Division Bench on this score [Claim No.6] 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 letters 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 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 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 confirmed 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 completed within 15 months, it does not follow that the aforesaid stipulation was confirmed 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 stipulation/condition contained in the agreement between the parties. We therefore, affirm the decision of the Division Bench on this Count as well [claim No.9].

So far as the position of the 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], within 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 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".

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