State Of Orissa & Another vs Kalinga Construction Co. (P) Ltd on 11 September, 1970

Equivalent citations: 1971 AIR 1650, 1971 SCR (2) 110

Author: A.N. Grover

Bench: A.N. Grover, J.C. Shah, K.S. Hegde

PETITIONER:
STATE OF ORISSA & ANOTHER

Vs.

RESPONDENT:
KALINGA CONSTRUCTION CO. (P) LTD.

DATE OF JUDGMENT:
11/09/1970

BENCH:
GROVER, A.N.
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GROVER, A.N.
SHAH, J.C.
SHAH, J.C.
HEGDE, K.S.
SHAH, J.C.
HEGDE, K.S.

CITATION:
1971 AIR 1650 1971 SCR (2) 110

ACT:
Arbitration--Award by arbitrator after considering and believing certain evidence-If open to court to sit in appeal over such award-Arbitration Act. 1940. Ss. 30 and 33.

HEADNOTE:
The respondent Company's tender for the movement and depositing of earth on the right dyke of the Hirakud Dam was provisionally accepted by the Government in December 1951. The work started in Fehr any 1952 and a formal contract was executed in March 1953. The earth work was done by manual labour for a year in the beginning and thereafter it was done to a large extent by machinery. The vertical movement

was styled as "lift" and the horizontal movement as "lead". When the company started employing the heavy machinery from the beginning of 1953 onwards a number of ramps had to be constructed to enable the machinery to go up from the borrow pits to the dyke. After the work was completed, the respondent Company was paid a certain amount on the basis of a scale set out in the contract; but it claimed an additional substantial sum in respect of lifts and extra leads and certain other items together with the interest on the amounts duo. It was provided in the contract that if the average lead mentioned bad to be exceed, the orders of the Chief Engineer in writing had to, be obtained by the contractor. The respondent Company claimed that it had 'sought the orders of the Chief Engineer in writing for the extra leads resulting from the conversion of lifts into leads and that although the Chief Engineer did not himself make any such order, the Superintending Engineer with whom the Company had been dealing did sign an order for the Chief Engineer. The contract provided for arbitration of disputes and differences. After the matter was taken up for arbitration, issues were framed by the arbitrator and considerable oral and documentary evidence was led by both the parties before him. On the basis of this evidence the arbitrator found that the tender must be taken to have been made and accepted on the basis that the whole work was to be done by manual labour; he believed the evidence of the Chief Engineer that he passed no order allowing any extra leads and eventually held that no further amount was payable by the Government to the Company. The respondent thereafter filed a plaint under Sections 30 and 33 of the Indian Arbitration Act, 1940, challenging the award on various grounds and praying for it to be set aside. The subordinate Judge who heard the ease set aside the award in March 1962. In an appeal to the High Court the two Judges who constituted the Division Bench gave dissenting judgments, i.e. one of them holding that the award could not be substained and the other one being of the view that the award was not liable to be set aside. The appeal was then heard by a third judge who held that the award was liable to be set aside on two of the issues; as he held these issues to be severable, he proceeded to set aside the award in res-
On appeal to this Court,
185
HELD : The appeal must be allowed and the order of the High Court setting aside the award in part must be reversed. The proceedings instituted by the respondent under Sections 30 and 33 of the Arbitration. Act must be dismissed.
A bare perusal of the judgment of the third learned Judge of the High. Court clearly showed that he decided the matter as it he was entertaining an appeal against the award. He re-examined and reappraised the evidence which had been considered and believed by the arbitrator It was not open to the High Court to sit in appeal on the arbitrator's award.

[189 C]
Once it was found that under the terms of the contract the Order of the Chief Engineer in writing had to be obtained before the work involving additional leads was executed,- in the absence of any such written order it was not open to the court to hold that the appellant was liable for payment of extra leads by applying some principle or rule analogous to estoppel. Although it was true that the company had been writing to the Engineering Department in the matter and that the latter did not, for a considerable time, send any reply but the Company was debarred from asking for any additional payment in the absence of the Chief Engineer's order in writing. If the arbitrator came to that conclusion, it could not be said that there was any error apparent in his award which would justify setting aside. 1190 C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2023 of 1969.

Appeal from the judgment and decree dated February 18, 1965 of the Orissa High Court in Misc. Appeal No. 53 of 1962. S. T. Desai, Gobind Day and R. N. Sachthey, for the appellants.

V. T. Rangaswami; T. Raghavan, B. Datta, D. N. Mishra and J. B. Dadachanji, for the respondent.

The Judgment of the Court was delivered by Grover, J. This is an appeal by certificate from a judgment of the Orissa High Court relating to an award given by Shri A. V. Viswanatha Sastri an Ex-Judge of the Madras High Court in a dispute which arose between the respondent and the Union of India in respect of a claim made by the former for a sum of Rs. 35,45,080.91 which was stated to be due for earth work done on the right dyke of the Hirakud Dam. The Chief Engineer, Hirakud Dam, invited tenders on behalf of the Union of India for execution of work specifying certain details as to how tender-, were to he submitted. It appears that before the tenders were invited certain estimates were prepared in the office of the Chief Engineer. The intending contractors were to submit tenders stating the rate for depositing earth on the Right Dyke site including all lifts and leads. The respondent company submitted a tender which, according to the Chief Engineer, was not in the form invited by him as certain extraneous L235Sup.CI-13 matters were stated to have been introduced. The Chief Engineer and the representatives of the respondent company held a conference at which certain agreements were arrived at. The tender of the contractor was provisionally accepted on December 28, 1951; the formal contract was executed much later on March 21, 1953. The work started in February 1952 and took four years for completion. The earthwork was done by the company by manual labour for a year in the beginning and thereafter it was done to a large extent by machinery. The earth required to erect the dyke was dug up from certain areas demarcated by the Engineering Department near the site of the dyke. The places from which the earth had to be taken were called "borrow pits" or "borrow areas". The company dug up earth from the "borrow pits" and dumped it on the site of the dyke upto the required specifications.

This involved movement of the loose earth both vertically and horizontally from the borrow pit to the dyke. The vertical movement was styled as "lift" and the horizontal movement as "lead". When the company started employing the heavy machi- nery from the beginning of 1953 onwards a number of ramps had to be constructed to enable the machinery to go up from the borrow pits to the dyke.

It has not been disputed that for the earthwork done by the company it received payment from the Government of an amount aggregating Rs. 1,08,19,543.00. This amount was paid in accordance with the rate in item I-A of the contract (Ext. P-69). According to that rate Rs. 45/- were to be paid for 100 cubic feet of earthwork of all kinds of soil laid in 6"

> layers with rough dressing including all lifts and average lead not exceeding. 10". According to the company an additional sum of Rs. 26,20,798.75 was due in addition to the amount already paid in respect of extra leads including lifts. An amount of Rs. 2 lakhs was claimed on account of the construction of ramps. The company further claimed a sum of Rs. 5,34,282-16 on account of interest on the aforesaid two amounts. This claim was disputed by the Union of India and it was maintained on its behalf that the company had been fully paid for the earthwork done by it according to the terms of the contract and that the company was not entitled to payment for lifts nor was there any occasion for leads in excess of an average of tO and further that the ramps in so far as they were outside the dyke were not to be paid for while those which had been incorporated in the dyke had already been paid for as a part of the dyke. The agreement by which reference was made to the arbitrator was as follows :-
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> "The disputes and difference between the parties relating to payment of lift equivalent and leads for machine route are referred to the arbitration of Shri A. V. Viswanatha Sastri, retired High Court Judge, Madras and his award shall be final and binding on the parties."

On November 16, 1958 the following issues were framed by he Arbitrator by the consent of both the parties

(i) Is the claimant entitled to any payment for lifts under the terms 'of the contract between the parties ?

NOTE : Both sides agree that I foot of lifts is equal to 12-2-1/2 feet of lead.

(ii) Whether the claimant is entitled to payment for machine leads where machines have been used for earthwork and if so, on what basis and at what rates?

(iii)Whether in the case of machine leads, lifts are not taken into account as pleaded by the Union of India ?

(iv) Whether the claimant is entitled to the cost incurred in putting tip the ramps ?

(v) Is the Union of India estopped from denying liability for payment of lifts and machine leads for the reasons stated in paragraphs 1 1 to 14 of the Statement Claim of Ramlinga Construction Co. (P) Ltd. ?

(vi) Is the claimant entitled to interest for the period during which the-amounts payable to the claimant remained unpaid by the Government, if so. at what rate .?

(vii)What is the amount due to the claimant from the Union of India ?"

> A good deal of oral and documentary evidence was led by both the parties before the arbitrator. After discussing the same he came to the following conclusions :--
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> 1.The tender must be taken to have been made and accepted on the basis that the whole work was to be done by manual labour.
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> 2.According to the terms of the contract if the averaee lead of IO had to be exceeded the orders of the Chief Engineer in writing had to be obtained by the contractor and then the extra lead was to be paid for at the rate of Rs. 1.12 As. per 1000 cubic feet. The company did raise the question of payment for lifts as early as December 30, 1952 and sought the orders of the Chief Engineer in writing for the extra lead resulting from the conversion of lifts into leads but the Chief Engineer never made any order in writing. The arbitrator believed the evidence of the Chief Engineer Shri kanwar Sain that he passed no orders allowing the company an extension of lead beyond the average 10. As the obtaining of the written order of the Chief Engineer was an essential condition which had to be complied with before. a claim for extra lead could be made the company was not entitled to payment for the extra leads beyond the average 10.

(3)The letter Ext. P-6 dated March 30, 1953 which was signed by the Superintending Engineer for the Chief Engineer had not been proved to have been written either under the instructions of the Chief Engineer or approved by him. In this letter it was stated, inter alia, that the words "average 10 leads mentioned in the special conditions of the agreement include the initial lead and lift and all other lifts between the borrow area and the Dyke". The Chief Engineer's evidence relating to Ext. P-6 was believed. The final conclusion of the arbitrator on issue No. 1 was that under the terms of the contract between the parties the rate of Rs. 45/- per 1000 cubic feet covered all lifts and that lifts had not to be separately paid for. On issue No. 2 the company's claim for extra payment for machine leads was held to be untenable. The finding on issue No. 3 was that in case of machine leads lifts were not to be taken into account. On issue No. 4 the arbitrator held that the company was not entitled to recover the costs incurred in putting up the ramps. On issue No. 5 it was decided that the Government was not estopped from denying liability for payment for lifts and machine leads. On issues 6 and 7 the arbitrator found that no amount was payable by the Union of India to the company nor was the Union liable to pay any interest.

The respondent company filed what was called a plaint under ss. 30 and 33 of the Indian Arbitration Act 1940 in the court of the Subordinate Judge, Sambalpur, challenging the award on various grounds and prayed that it be set aside. It was further prayed that another arbitrator be appointed to make a fresh award regarding the disputes between the parties. The Subordinate Judge set aside the award by his order dated March 17, 1962. The Union of India preferred an appeal to the High Court which was beard by Barman and Das, JJ. Learned judges gave dissenting judgments, Burman J., was of the view that the award could not be sustained whereas Das J., was of the opinion that the award was not liable to be set aside. The appeal was then heard by a third Judge G. K. Misra J. On issues 1 and 2 Misra J. agreed with the judgment of Barman J., but on issues 3 and 4 he concurred with the, decision of Das J. According to his judgment the award could not be set aside on issues 3 and 4 whereas it was liable to be set aside on issues 1 and 2. As the issues were severable he set aside the award only on issues 1 and 2.

A bare perusal of the judgment of Misra J. would show that lie decided the matter as it he was entertaining an appeal against the award itself. He re-examined and re-appraised the evidence which had been considered by the arbitrator and held that the arbitrator was wrong in coming to the conclusion that the work was contemplated by the contract to be done by manual labour alone. According to him under the agreement payment for machine leads was contemplated from the very beginning or at any rate was not excluded. He examined a large volume. of evidence including Ext. P-6 as also the oral evidence of the Chief Engineer Shri Kanwar Sain and held that from the course of correspondence it was clear that in dealing with the contractor or the Executive Engineer almost all the letters on behalf of the Chief Engi- neer were being dealt with by the Superintending Engineer. Once Ext. P-6 was admitted to be genuine and was issued by the Superintending Engineer in the ordinary course of correspondence it was for the appellant to establish by production of the relevant records that that letter had been issued without authority of the Chief Engineer. Misra J., had no hesitation in holding that Ext. P-6 was written under the authority of the Chief Engineer and was binding between the parties. Here again what Misra J., id was to appreciate the evidence which had been considered by the arbitrator, in particular, the testimony of the Chief Engineer. The arbitrator had believed the statement of the Chief Engineer that Ex. P-6 had neither been issued under his authority nor with his approval. Once this part of his statement was believed by the arbitrator it was not open to Misra J.. to sit in appeal over the conclusion of the arbitrator in proceedings for setting aside the award. The other serious error into which Misra J., fell was to record a finding on the payment for extra leads beyond 10 in reversal of the conclusion of the arbitrator. This is what the learned judge proceeded to say :

> "The next point for consideration is whether the payment for extra leads beyond 10 are to be rejected because the Chief Engineer's order in writing had not been obtained before the work involving additional leads was executed. Both under Ex. P. 2 and Ext. P. 69 this term had been incorporated. In the peculiar circumstances of this case, however, it must be taken that the condition had been fulfilled even though there was no order in writing. It was for the Executive Engineer and the Superintending Engineer, who were getting the work done by the Company, to obtain the order in writing or not to allow the Company, to work beyond 10 leads including lifts without obtaining the order of the Chief Engineer in writing."

Once it was found that under the terms of the contract the order of the Chief Engineer in writing had to be obtained before the work involving additional leads was executed and in the absence of any such written order it was not open to the court to hold that the appellant-Union of India-was liable for payment of extra leads beyond 10 by applying some principle or rule analogous to estoppel. It is no doubt true that the company had been writing to the Engineering Department in the matter and that the latter did not, for a considerable time, send any reply but the company was debarred from asking for any additional payment in the absence of the Chief Engineer's order in writing. If the arbitrator came to that conclusion it could not said that there was any error apparent in his award which would justify setting it aside.

For the reason given above the appeal is allowed and the order of the High Court setting aside the award dated July 19, 1959 in part as indicated in the judgment of Misra J., is hereby reversed. The proceedings instituted by the respondent under ss. 30 and33 of the Indian Arbitration Act, 1940, shall stand dismissed. In. view of the entire circumstances the parties are left to bear their own costs in this Court.

R.K.P.S. Appeal allowed.