2022 INSC 1217

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8571__/2022
ARISING OUT OF SLP (C) NO. 907 OF 2020

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THE STATE OF MADHYA PRADESH ....APPELLANT(S)

VERSUS

M/S SEW CONSTRUCTION LIMITED & ORS. …RESPONDENT(S)

J U D G M E N T

PAMIDIGHANTAM SRI NARASIMHA, J.

1. Leave granted.

2. This appeal is against the decision of the High Court of Madhya Pradesh in an Arbitration Revision No. 4 of 2009 under Section 19 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983[1] whereby the award of the Arbitral Tribunal was upheld.

3. The short facts leading to the Arbitral Award and thereafter the decision of the High Court may be stated as under.

4. The State issued a tender notice[2] for the construction of a Masonry Dam and eventually, Respondent No. 1 (hereinafter referred to as 'the Contractor')

1 hereinafter referred to as 'The Adhiniyam'.
2 Tender Notice No. 1/1992-1993.

was selected as the successful bidder. A contract was entered into on 06.11.1993 for a total consideration of Rs. 1,22,81,86,600/-, to be completed within a period of sixty months.

5. As the only issue arising for consideration, in this case, relates to the claim of escalation made by the Contractor, the relevant clause is extracted hereunder:

> *"3.11(A) The quoted rates of the contractor shall be inclusive of the leads and lifts and in no case separate payment for leads or lifts to any materials including water shall be payable. Similarly no leads or lifts for the materials issued by the department as prescribed in the tender documents shall be payable. The contractor shall bring approved quality of materials. Different quarries are shown in Annexure C. The details shown in the Annexure C are only as a guide to the contractor but the contractor before tendering should satisfy himself regarding the quantity and quality available and all other details of Annexure C and provide for any variation in respect of leads, lifts, place and method of quarrying, type of rocks to be quarried and all such other aspects in his tendered rate. Later on any claim whatsoever shall not entertained except where any quarry is changed for circumstance beyond the control of contract under the written order of Superintending Engineer in-charge of work."*

6. Though the contract was entered into in 1993, the work was suspended for a long time and it resumed on 18.09.2000. While carrying out the construction work under the contract, the Contractor requested an alternate quarry on 07.03.2002, which was denied by the Executive Engineer on 11.03.2002. The decision of the Executive Engineer was also confirmed by the Superintending Engineer on 12.12.2002 and this has led the Contractor to seek a

reference of the matter to arbitration[3] (hereinafter referred to as 'the first arbitration').

7. While the above-referred claim for an alternative quarry followed by the reference to the arbitration was pending, the Contractor renewed the request for an alternate quarry, this time for excavating sand from Mahuar quarry. This request was made on 20.10.2002. On the basis of this request, a committee of two Executive Engineers and one Sub-Divisional Officer conducted an inspection of the original quarry that was allotted to the Contractor i.e., the Barua Sand quarry as well as the new proposed quarry i.e., the Mahuar Sand quarry. This inspection report dated 31.10.2002 suggested that there was no sand available in the quarry originally allotted under the contract and there was justification for the request made by the Contractor for allotment of the Mahuar quarry which had sufficient stock of sand available.

8. Following the inspection report the Superintending Engineer by his letter dated 12.11.2002 granted permission to the Contractor to excavate sand from Mahuar quarry. It is important to mention here the specific and categorical statement of the Superintending Engineer that the permission granted under his letter would be subject to the conditions specified in Clause 3.11(A) of the contract. The relevant portion of the letter is extracted hereinbelow:

> *"….Accordingly after inspection and discussion, the permission for excavating the sand from Mahua river sand quarry, to the executive engineer is proposed, so the construction work would not adversely affected. In this regard*

3 Reference case no. 38/2003.

> *on telephone, I have discussed the matter with the Chief Engineer on 31/10/2002 and his inspection report dated 17/09/2002 and 18/09/2002 was referred in which it has been mentioned that, if in Barua Nala sand Quarry the sand is not available then the sand from Mahua river be obtained, which was confirmed by him on 31/10/2002 during telephonic conversation…..*
> *….Therefore it is directed to the Executive Engineer, Madikheda Dam(concrete Dam), Sindh Project and Executive Engineer, Sindh Project(Mud Dam), in place of Barua Nala, the sand of Mahuar River be used for construction of projects under clause 3.11A of the condition of contract agreement, the permission is granted. The Executive Engineers are further directed that they will grant permission to the respective contractor under clause 3.11A of the condition of contract agreement, so the construction work would not be adversely affected."*

9. In compliance with the above-referred letter of the Superintending Engineer, the Executive Engineer granted conditional permission to use the Mahuar quarry under his letter dated 23.12.2002 which stated as under:

> *"Permission to collect sand from Mahua river is hereby accorded with following conditions.*
> *1. It is assumed as per clause 3.11A that provision in the tender rate already exist for extra expenditure due to change in lead, hence no payment for extra lead is admissible in this account, nor any claim on this subject shall be acceptable by this office.*
> *xxx*
> *5. No extra time, fate or payment shall be allowed for construction to this change"*

10. Despite the conditional permission granted by the Executive Engineer, the Contractor for the first time on 10.11.2006 raised a claim of Rs. 5,51,03,040/- towards escalation for the enhanced cost incurred due to the transportation of sand from the Mahuar quarry. The request was rejected by the Superintending Engineer in his letter dated 14.12.2006, stating that:

> *"As per the clause 2.25 of N.l.T. page 50 of the agreement and note Annexure -C page 85 which stat that "This statement is*

> *only for the guidance of the contractor. The Tender should satisfy himself regarding availability of the required quantity and quality of materials."*
> *Thus as per this clause the tender is therefore supposed to satisfy himself about the availability of the quantity and quality of material to be used before tendering. The lead chart is for guidance only. Therefore this aspect is covered in the item of works of schedule of quantities (Annexure -1) appended with the tender and no claim is entertained of this page.*
> *Therefore according to above referred clause of agreement your claim of sand for extra lead is not valid and hence rejected."*

11. Aggrieved by the above-referred rejection of the claim by the Superintending Engineer, the Contractor raised a claim under Section 7 of the Adhiniyam seeking resolution of the dispute through statutory arbitration.

12. By Award dated 26.11.2008, the Arbitrator accepted the claim raised by the Contractor and awarded an amount of Rs. 5,51,03,040/- with 9% interest in favour of the Contractor. The revision filed by the State against the Award under Section 19 of the Adhiniyam was dismissed by the order impugned herein. The High Court rejected arguments of the State and allowed the claim of the Contractor on mainly three grounds: (a) the claim filed by the Contractor is not barred by limitation; (b) the principle of res judicata is not appliable, and (c) the Contractor is entitled to the escalation as provided in clause 3.11(A) of the contract.

Submissions by the Parties:

13. Shri Saurabh Mishra, learned Additional Advocate General for the State of Madhya Pradesh submitted that the claim made by the Contractor is barred by res judicata. What he really means is that the original claim made by the

Contractor on 07.03.2002 leading to the initiation and rejection of claims under the first arbitral award dated 06.10.2007 become final, and therefore a similar claim is inadmissible. Shri Saurabh Mishra took us through the letters in the additional compilation evidencing the request for arbitration, the rejection by the Executive Engineer dated 11.03.2002 and thereafter by the Superintending Engineer dated 12.12.2002, the communication for reference to arbitration dated 24.12.2002, and its culmination into the first award dated 06.10.2007. None of these facts are disputed by Ms. Menaka Guruswamy, learned Senior Advocate appearing on behalf of the Respondent No.1.

14. Shri Saurabh Mishra also argued that the letter of the Superintending Engineer dated 12.12.2002 followed by the letter of the Executive Engineer was implicitly accepted by the Contractor in letter and spirit and without any protest. It is only after a period of four years that the Contractor for the first time raised a plea for escalation, claiming an amount of Rs. 5,51,03,040/- under a letter dated 10.11.2006. He would, therefore, argue that this plea should not be permitted to be raised. He finally submitted that while the Superintending Engineer rejected even the belated request on 14.12.2006, the claim for arbitration was beyond the period of limitation as per the contractual terms as the claim was made only on 10.12.2007.

15. Countering the submissions of the State, Ms. Menaka Guruswamy submitted that sand is an essential ingredient for the execution of the contract.

Initially, the lead provided for her client was at a distance of 20 kilometers from the Baruanala quarry. The transportation from the *lead* and the lifting of the sand, together constitute an integral part of the cost. Both these components have a serious impact on the profitability for the Contractor. According to her, it is an admitted fact that the Baruanala was depleted of sand and therefore, it became compelling to provide an alternative site for executing the contract. However, the alternative site is at an additional distance of 40 kilometers and therefore her client had to incur the extra cost for the transportation of the sand. It is for this reason that the Superintending Engineer, as well as the Executive Engineer, have granted the requisite permissions after due inspection and therefore, the claim for escalation is justified.

16. It was further argued that the first arbitral award dated 06.10.2007 rejecting the previous claim will have no bearing on the present proceedings as the former related to the first part of the clause and the present arbitration would relate to a period thereafter. She argued that as the request for arbitration relates to the later part of the clause, the earlier award cannot operate as res judicata.

17. We may mention at this very stage that this argument has the effect of bifurcating the contract into two parts which is an impermissible interpretation. The contract is a solitary agreement, intended to be performed, executed and discharged as a single obligation. The rights and obligations under the contract cannot be read separately by dividing it into two parts. This argument is,

therefore, rejected at the outset. However, we will now proceed to consider the other submissions.

Analysis and Findings:

18. Determination of the claim for escalation depends on the construction of clause 3.11(A) of the contract, which provides that the claim for escalation will not be entertained unless there exist circumstances beyond the control of the contract. Further, the claim is admissible only upon the written order of the Superintending Engineer in charge of the work. In our view, both conditions are satisfied. In the first instance, the inspection report dated 31.10.2002 clearly indicates that the original quarry is depleted of the sand and therefore an alternative quarry is necessary for the execution of the contract. Secondly, this is a circumstance which is certainly beyond the control of the Contractor. Further, the permission granted by the Superintending Engineer dated 12.11.2002 is in complete satisfaction of the requirement of the clause. We are of the opinion that the claim for escalation is in full satisfaction of the terms of the contract.

19. The most important submission of the State is that the claim for arbitration is in fact barred by res judicata. We have examined this submission in detail and our findings are as follows.

20. The initial request for a change of quarry was made on 07.03.2002. This request was rejected by the Executive Engineer on 11.03.2002 and the same was confirmed by the Superintending Engineer on 12.12.2002. Without any factual

basis justifying the need, or proving circumstances beyond the control of the Contractor, a claim was made for arbitration at the first instance on 24.12.2002. It is this reference that the Arbitrator considered and rejected by his award dated 06.10.2007. As is evident from the above, (a) the request for arbitration was made in 2002 itself, (b) there was no proof of the fact that the Contractor was in a position which is beyond his control, (c) there was no written order by the Superintending Engineer granting sanction for the change of quarry, (d) there were in fact letters of the Superintending Engineer as well as the Executive Engineer rejecting the claim for an alternate quarry. These four factors make all the difference between the first arbitral award and the present proceedings. Hence, the principle of res judicata is not applicable.

21. A further question which remains for consideration is with respect to the letter of the Executive Engineer granting conditional permission. Shri Saurabh Mishra has submitted that while the Contractor accepts the alternate quarry, they cannot wriggle out of the condition of no escalation. We will presently deal with this submission.

22. A contractual clause which provides for the finality of rates quoted by the Contractor and disallows any future claims for escalation is conclusive and binding on the parties. If the clause debarring future claims permits escalation subject to certain conditions, no claim is admissible if the conditions are not satisfied. However, if the conditions are satisfied, the Contractor will have a

right to claim escalation. This is a contractual right. The right originates and subsists by virtue of the contract itself. It is the duty of the Court, while interpreting the contract to decipher the true and correct meaning the parties intended and enforce the rights arising out of the contract. Officers administering the contract will not have any discretion whatsoever to admit or deny escalation after the conditions specified in a contract are satisfied.

23. The Executive Engineer has in our opinion acted beyond the scope of clause 3.11(A). Under the clause, if a circumstance beyond the control of the Contractor exists and the Superintending Engineer, in charge of work grants a written order to the effect, a right to seek escalation arises. When the two conditions provided under clause 3.11 (A) were satisfied, there was no discretion left with the Executive Engineer to impose any further conditions for claiming escalation. The Executive Engineer, in our opinion, has certainly acted beyond the scope of the contract. The role of the Executive Engineer was only to forward the decision of the Superintending Engineer and enable the Contractor to raise a claim for escalation.

24. *In the context of discretion, we may reiterate this principle. The rights and duties of the parties to the contract subsist or perish in terms of the contract itself. Even if a party to the contract is a governmental authority, there is no place for discretion vested in the officers administering the contract. Discretion, a principle within the province of administrative law, has no place*

in contractual matters unless, of course, the parties have expressly incorporated it as a part of the contract. It is the bounden duty of the court while interpreting the terms of the contracts, to reject the exercise of any such discretion that is entirely outside the realm of the contract.

25. Returning to the facts of the present case, whether the escalation is justified or not is another matter, and it is for the Arbitral Tribunal to decide the admissibility of the claim depending on the evidence on record. That will be a finding of fact, with which we are not concerned. For the reason stated above, we are of the opinion that the Arbitrator was justified in granting the claim for escalation as the conditions precedent for raising a plea for escalation are admittedly satisfied by the inspection report dated 31.10.2002 followed by the letter of the Superintending Engineer dated 12.11.2002.

26. The last submission of Shri Saurabh Mishra that the High Court has acted beyond the scope of Section 19 of the Adhiniyam remains to be considered. Section 19(2) of the Adhiniyam is as under:

> *"**19. High Court's power of revision**: (1)…..*
> *(2) If it appears to the High Court that the Tribunal —*
> *(a) has exercised a jurisdiction not vested in it by law; or*
> *(b) has failed to exercise a jurisdiction so vested; or*
> *(c) has acted in exercise of its jurisdiction illegally, or with material irregularity; or*
> *(d) has misconducted itself or the proceedings; or*
> *(e) has made an award which is invalid or has been improperly procured by any party to the proceedings, the High Court may make such order in the case as it thinks fit.*
> *(3) The High Court shall in deciding any revision under this section exercise the same powers and follow the same procedure as far as may be, as it does in deciding a revision under Section 115 of the Code of Civil Procedure, 1908 (No.5 of 1908)."*

27. Having examined the matter in detail, we are of the opinion that there are no errors of jurisdiction or acts of misconduct or events of invalidity or impropriety in the conduct of proceedings by the Arbitrator. For this reason, the High Court has rightly refrained from exercising its revisional jurisdiction under Section 19(2) by not interfering with the award passed by the Arbitral Tribunal.

28. For the reasons stated above, the Civil Appeal arising out of Special Leave Petition (C) No. 907 of 2020 is accordingly dismissed.

29. Parties to bear their own costs.

……………………………….J.
[A.S. BOPANNA]

……………………………….J.
[PAMIDIGHANTAM SRI NARASIMHA]

NEW DELHI;
NOVEMBER 18, 2022