A RAMACHANDRA REDDY AND CO.

v.

STATE OF ANDHRA PRADESH AND ORS.

FEBRUARY 27, 2001

B [G.B. PATTANAIK, U.C. BANERJEE, BRIJESH KUMAR, JJ.]

The Arbitration Act, 1940 :

Section 16—Remission of award—Power of Court—Discretionary—Exercise of—When—Held, when there are omissions and defects in the award C *which cannot be modified or corrected—Appellate Court—Interference—When—Held, when discretion misused by Trial Court.*

Sections 16, 30 and 33—Award—Interference—Error apparent on the face of award—Meaning of—Held, when basis of award erroneous Courts not D *to investigate beyond award of arbitrators and documents actually incorporated therein for purpose of finding out any alleged error.*

Contractor seeking higher rate for extra quantity of work—Agreement not providing for escalated rate either expressly or impliedly—Competent Authority granting extension of time but specifically intimating it will not make E *contractor eligible for extra claim—Whether contractor entitled to higher rate—Held, contractor not entitled to higher rate for additional excavation work—Arbitrator being creature of agreement, cannot pass award beyond terms of agreement.*

Appellant-Claimant was awarded excavation work under a contract F **by respondent. Dispute arose between parties which was referred to panel of arbitrators which rejected claim item Nos. 1, 2 and 3 while allowing claim item nos. 4 and 5. Claim Item No. 1 relates to increase in quantity of hard rock abnormally and appellant claimed Rs. 93,76,000 for such extra excavation. Claimant filed objection in the Civil Court under Section 16 of the Arbitration Act, 1940 against award of arbitrators rejecting claim** G **item Nos. 1, 2 and 3. Trial Court set aside award in relation to claim item No. 1 and some others and remitted the same for reconsideration to panel of arbitrators. Against the judgment of Trial Court, respondent preferred appeal under Section 39 which was allowed by the High Court in so far as it related to remitting claim item no. 1 while upholding other directions of** H **the Trial Court. Aggrieved by the judgment of High Court, claimant-**

contractor has filed the present appeal. A

Appellant contended that High Court committed serious error in referring to clause 59 as well as letters dated 15.7.1980 and 19.5.1983 while refusing payment at higher rate for additional excavation work; that arbitrators committed error apparent on the face of award; that payment at higher rate for additional excavation was implied in view of recommendations of Executive Engineer; and that contractor was entitled to be paid at higher rate for additional excavation in accordance with Clause 63 of the agreement. B

Respondent contended that the award did not contain any error apparent on the face of it; that contention regarding payment at higher rate for additional excavation under clause 63 of the agreement was raised for the first time and should not be allowed to be raised and alternatively, that Clause 63 has no application for additional excavation since it applies only to supplemental items and additional excavation is not a supplemental item; that claim for payment at higher rate for additional excavation was not sustainable in view of letters of respondent dated 15.7.1980 and 19.5.1983 while allowing extension of time for completion of work; and that judgment of Trial Court tantamounts to gross error of jurisdiction in interfering with an award as no reasons have been given for remitting claim item Nos. 1, 2 and 3 for reconsideration. C D E

Dismissing the appeal, the Court

HELD : 1.1. Under the Arbitration Act, Section 16 is the provision under which the Court may remit the award for reconsideration of an arbitration and necessity for remitting the award arises when there are omissions and defects in the award, which cannot be modified or corrected. Remission of an award is in the discretion of the Court and the powers of the Court are circumscribed by the provisions of Section 16 itself. Ordinarily, therefore, a Court may be justified in remitting the matter if the arbitrator leaves any of the matters undetermined or a part of the matter which had not been referred to and answered and that part cannot be separated from the remaining part, without affecting the decision on the matter, which was referred to arbitration or the award is so indefinite and incapable of execution or that the award is erroneous on the face of it. Discretion having been conferred on the Court, to remit an award, the said discretion has to be judicially exercised and an appellate F G H

A Court would not be justified in interfering with the exercise of discretion unless the discretion has been misused. [192-H; 193-A-C]

1.2. An error of law on the face of the award would mean that one can find in the award or a document actually incorporated thereto stating the reasons for a judgment some legal propositions which is the basis of the B award and which can be said to be erroneous. Documents not incorporated directly or indirectly into the award cannot be looked into for the purpose of finding out any alleged error. The courts are not to investigate beyond the award of the arbitrators and the documents actually incorporated therein and, therefore, when there would be no patent error on the face of the C award, it would not be open for the Court to go into the proceedings of the award. If the application for remittance filed by the claimants invoking jurisdiction of the court under Section 16 is examined and if the order of the Civil Court, remitting claim Item No. 1 is tested, the conclusion is irresistible that no case for remittance had been made out and the trial Judge exercised his discretion on the ground which does not come within the four- D corners of the provisions of Section 16 of the Arbitration Act. In fact no reasons had been ascribed for interference with the award, rejecting claim Item No. 1 and for remittance of the same. [193-D-F]

2.1. The question of granting a higher rate for any extra quantity of work executed by the contractor would at all arise only when the contract E provides for such escalated rate either expressly or by implication. When there is no such acceptance by the competent authority, and there is no provision in the contract, permitting such escalated rate for the additional quantity of excavation made, the conclusion is irresistible that the contractor will not be entitled to a higher rate for the additional excava- F tion work. [197-A-B]

S. Harcharan Singh v. *Union of India*, [1990] 4 SCC 647, distinguished.

National Fertilizers v. *Puran Chand Nangia*, [2000] 8 SCC 343, cited.

G 2.2. Arbitrator being a creature of the agreement, unless agreement either specifically or inferentially provides for a higher rate to be awarded for any additional or excess work done by the contractor, it would not be permissible for the arbitrator to award for the so called additional work at higher rate. There is no letter from the competent authority, namely the H Superintending Engineer that the contractor would be paid at any higher

rate for the additional excavation of rock, though the Executive Engineer had indicated that he has recommended to the Superintending Engineer. But such recommendation of the Executive Engineer, who was not competent to decide the question of awarding a higher rate for the excess quantity of excavation will not clothe any jurisdiction on the arbitrator to award the contractor at a higher rate nor would it entitle the contractor to get a higher rate for the claim in question or the basis of agreement. [196-C-D] A B

3. Clause 63 of the agreement relates to supplemental item, which have been found essential, incidental and inevitable during the execution of the work. The excavation of hard rock cannot be held to be a supplemental item and on the other hand, is an item of work tendered and accepted, and as such clause 63 will have no application to the claim item No. 1. [196-E] C

4. The letters of the competent authority specifically intimated the contractor that the grant of extension of time will not in any way make the contractor eligible for any extra claim due to escalation in rates of labour and materials or due to any other reasons under any circumstances. [197-D] D

Ch. Ramalinga Reddy v. *Superintending Engineer and Anr.*, [1999] 9 SCC 610, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9405 of 1995. E

From the Judgment and Order dated 13.4.93 of the Andhra Pradesh High Court in C.M.A. No. 1784 of 1989.

P.P. Rao, K. Maruthi Rao, K. Prabhakar, Mrs. K. Radha, Mrs. Rani Chhabra for the Appellant. F

Ms. K. Amreswari and G. Prabhakar for the Respondents.

The Judgment of the Court was delivered by

PATTANAIK, J. Claimants are the appellants against the judgment of the Andhra Pradesh High Court, arising out of an arbitration proceeding. The North work excavation of approach channel of Srisailam Project had been awarded to the claimants for different amounts indicated in the contract. The contract itself contained an arbitration clause. Dispute being raised on different items of claim, those disputes had been referred to a panel of arbitrators and the panel of arbitrators, ultimately passed an award where-under claim Items G H

A 1, 2 and 3 stood rejected. So far as claim item No. 4 is concerned, the same was allowed in part. Claim Item No. 5 was claim of interest and the arbitrators allowed the interest @ 12 per cent per annum over the amount awarded. Claim Item No. 6 was the claim of cost and the arbitrators directed that each party will bear its own cost. Against the award of the arbitrators, rejecting claim item Nos. 1, 2 and 3, the claimants filed an objection in the Civil Court and sought B for remittance under Section 16 on the ground that the arbitrators have left undetermined the claims of the claimants on item No.1, 2 and 3 on an erroneous view of the relevant clauses of the agreement. Claimants also filed an application under Section 14 to make the award in relation to claim allowed by the arbitrators as a rule of Court. The State of Andhra Pradesh also filed a petition C under Section 30 of the Arbitration Act to set aside that part of the award which allowed the claim of the contractor to the extent of Rs.57,000/-. All these applications which were registered as O.S. No. 1094/86, O.P.104/87 and O.P.424/87 were disposed of by a common judgment of the learned Vth Additional Judge, City Civil Court, Hyderabad. The said learned Judge made the award in relation to claim item No.4 a rule of Court. But he set aside the award in D relation to claim item Nos: 1,2,3 and 5and remitted the same for reconsideration to the panel of arbitrators. Against the aforesaid Judgment of the Additional Judge, City Civil Court, remitting the disputes/claims in relation to claim items 1, 2, 3 and 5 to the panel of arbitrators, the State of Andhra Pradesh preferred appeals under Section 39 of the Arbitration Act. The High Court by the E impugned judgment set aside the order of the Additional Judge, so far it relates to remitting the claim item No. 1 to the panel of arbitrators for reconsideration. So far as claim item Nos. 2 and 3 are concerned, the High Court upheld the direction of the Additional Judge, but, appointed a retired Chief Justice of the Court as arbitrator to arbitrate the claim items 2 and 3 and a part of claim item No. 5 relating to interest. In this appeal filed by the claimants, we are F concerned only with claim item No.1. The legality of the award in relation to claim items 2 and 3 are the subject matter of an appeal, which is pending in this Court.

Claim Item No. 1 relates to increase in quantity of hard rock abnormally and on this head, the claimants had claimed Rs. 93,76,990/-. The claimants' G statement that was filed before the arbitrator, makes out a vague claim on this score without indicating the basis for the claim in question. In respect of the aforesaid quantity of extra excavation on hard rock, the State of Andhra Pradesh had made the payment in terms of Clause 25 of Schedule C of Section 2 of the agreement as per its letter dated 21st October, 1981. Notwithstanding H the said payment, the claimants had made the extra claim on the ground that the

quantity of excavation of hard rock being abnormally high and much beyond the anticipated quantity indicated in the agreement and even much in excess of the so-called 25 per cent of the work as per the GOMS No. 2289 dated 12.6.1968, the claimants are entitled to a separate rate for such extra excavation and the arbitrators failed to exercise their jurisdiction in not granting the claim and on the other hand, rejecting the same. The High Court in the impugned judgment however, referring to clause 59 of the agreement, which deals with delay and extension of time and in view of the letters of the Superintending Engineer dated 15th July, 1980 and 19th May, 1983, came to hold that the contractor-claimant will not be entitled to be paid at any higher rate for such additional excavation work and accordingly set aside the order of the learned trial Judge, remitting the claim item No. 1 for being re-disposed of by the arbitrator.

Mr. P.P. Rao, the learned senior counsel, appearing for the appellant, contended that the High Court committed serious error in referring to clause 59 as well as to the letter dated 15th July, 1980 and 19th May, 1983, in coming to the conclusion that the claimant-contractor will not be entitled to be paid at any higher rate for the extra amount of excavation made by him. Mr. Rao further submitted that under GOMS No. 2289 dated 12.6.1968, a deviation limit upto a maximum of 25 per cent being permissible, for any work in excess of that limit, the contractor is entitled to claim a higher rate and that being the position, the arbitrators had committed an error apparent on the award in refusing the claim and the High Court committed error in setting aside the order of remittance passed by the Additional Judge. In support of this contention, reliance was placed on the judgment of this Court in the case of *S. Harcharan Singh* v. *Union of India*, [1990] 4 SCC 647. Mr. Rao also further urged that in view of the recommendations of the Executive Engineer notwithstanding the continued objection of the claimant, expressing inability to continue with the abnormal increase in the hard rock excavation, it must be held that the payment at a higher rate for the additional or excess quantity of excavation was implied and failure on the part of the arbitrator to consider the same, constitutes an error on the face of the award and as such the learned Additional Judge was justified in remitting the matter for reconsideration of the arbitrator. Mr. Rao lastly submitted that for this excess of excavation work, the contractor was entitled to be paid in accordance with Clause 63 of the agreement, which has not been noticed by the arbitrator and adjudged from that stand point, the High Court also committed error in setting aside the order of remittance made by the learned Additional Judge.

A Ms. K. Amreswari, appearing for the respondent State of Andhra Pradesh, on the other hand contended that the power of interference of the Court under Sections 30 and 33 as well as under Section 16 is of a limited nature and the Court would be justified in interfering with the reasoned award of an arbitrator, if the award contains any apparent error on the same. If the impugned award is examined from the aforesaid stand point, the conclusion is irresistible that it did not contain any error and, therefore, the interference of the Court was not warranted. Ms. Amreswari further contended that the claimants nowhere in the claim petition had made out a case that for the additional quantity of excavation work, they are entitled to the rate as per clause 63 of the agreement which was urged for the first time in this Court and, therefore, the said contention should not be allowed to be raised. Ms. Amreswari further urged that clause 63 will have no application for the extra item of excavation made by the contractors since that clause applies to any supplemental item, which are found essential, incidental and inevitable during the execution of the work and by no stretch of imagination, the additional excavation which is the subject matter of claim in claim item No. 1 can be held to be supplemental item. Ms. Amreswari further submitted that for this additional quantity of excavation the claimant having been paid for in accordance with clause 25 of the agreement, the further claim of the contractor is not arbitrable at all and, High Court therefore was fully justified in setting aside the order of remittance made by the Additional Judge. Ms. Amreswari further contended that the claim for payment of higher rate for the work done beyond the agreement is not at all sustainable in view of the positive letter of the authorities dated 15th July, 1980 and 19th May, 1983, while allowing extension of time for completion of the work, as has been held by this Court in the case of *Ch. Ramalinga Reddy* v. *Superintending Engineer and Anr.*, [1999] 9 SCC 610, and, therefore, the High Court was fully justified in interfering with the directions of the sub-ordinate Judge in remitting the said claim item No.1 for fresh arbitration. Mrs. Amreswari lastly submitted that a bare scrutiny of the order of the Vth Additional Judge, City Civil Court, Hyderabad, remitting claim items Nos. 1, 2 and 3 for reconsideration would indicate that no reasons had been given for such remittance and on the face of it, the said judgment of the Civil Court tantamounts to gross error of jurisdiction in interfering with an award and transgressing the scope and limitation provided under Sections 30 and 16 and, therefore, the High Court was justified in correcting the said error in appeal.

H Under the Arbitration Act, Section 16 is the provision under which the

Court may remit the award for reconsideration of an arbitration and necessity for remitting the award arises when there are omissions and defects in the award, which cannot be modified or corrected. Remission of an award is in the discretion of the Court and the powers of the Court are circumscribed by the provisions of Section 16 itself. Ordinarily, therefore, a Court may be justified in remitting the matter if the arbitrator leaves any of the matters undetermined or a part of the matter which had not been referred to and answered and that part cannot be separated from the remaining part, without affecting the decision on the matter, which was referred to arbitration or the award is so indefinite as to incapable of execution or that the award is erroneous on the face of it. Discretion having been conferred on the Court, to remit an award, the said discretion has to be judicially exercised and an appellate Court would not be justified in interfering with the exercise of discretion unless the discretion has been misused. What is an error apparent on the face of an award which requires to be corrected has always been a subject matter of discussion. An error of law on the face of the award would mean that one can find in the award or a document actually incorporated thereto stating the reasons for a judgment some legal propositions which is the basis of the award and which can be said to be erroneous. Documents not incorporated directly or indirectly into the award cannot be looked into for the purpose of finding out any alleged error. The courts are not to investigate beyond the award of the arbitrators and the documents actually incorporated therein and, therefore, when there would be no patent error on the face of the award, it would not be open for the court to go into the proceedings of the award. If the application for remittance filed by the claimants invoking jurisdiction of the court under Section 16 is examined from the aforesaid stand point and if the order of the learned Civil Court, remitting claim Item No. 1 is tested in the light of the discussions made above, the conclusion is irresistible that no case for remittance had been made out and the learned trial Judge exercised his discretion on the grounds which does not come within the four-corners of the provisions of Section 16 of the Arbitration Act. In fact no reasons had been ascribed for interference with the award, rejecting claim Item No. 1 and for remittance of the same. The High Court being the Court of appeal, was therefore, fully justified in exercise of its appellate power in correcting the error made by the Civil Judge in remitting claim item No. 1.

Let us now examine the contentions of Mr. P.P. Rao, the learned senior counsel, appearing for the appellant. The learned counsel's contention in fact centres round the question as to whether for the additional quantity of exca-

A vation work, the contractor would be entitled to at a higher rate in accordance with Clause 63 of the agreement. Mrs. Amreswari, appearing for the State was fully justified in her submissions that this contention had never been raised either before the arbitrator or before the subordinate Judge or even before the High Court. In fact the claim petition filed before the arbitrator is rather B cryptic and absolutely vague, not indicating on what basis the additional claim is made, though the foundation for the claim was there, namely there had been an increased amount of excavation work beyond the agreement. It is in this connection, Mr. Rao had relied upon the two decisions of this Court in the case of *S. Harcharan Singh* v. *Union of India*, [1990] 4 SCC 647 and *National Fertilizers* v. *Puran Chand Nangia*, [2000] (8) SCC 343. But before C examining the said contention, it would be appropriate for us to extract Clause 63, which was the sheet anchor of the argument of Mr. Rao. Clause 63 reads as under:

> "*Cl.63. Payment for additions and deductions for omissions:* (A) The contractor is bound to execute all supplemental items that are found D essential, incidental and inevitable during the execution of the work, at the rates to be worked out as detailed below:
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> (a) For all items of work in excess of the quantities shown in schedule A of the tender the rates payable for such items shall be either the tender rates or the standard schedule of rates for the items plus or E minus the overall tender percentage accepted by the competent authority which ever is less.
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> (b) For items directly deducible from similar items in the agreement, the rates shall be derived by adding to or substracting from the agreement rate of such similar items, the cost of difference in quantity F of material or labour between the new items and the similar items in the agreement, worked out with reference to the Schedule of rates adopted in the sanctioned estimate plus or minus the overall tender percentage.
>
> (c) For new items which do not correspond to any items in the G agreement, the rates shall be standard schedule rate plus or minus the over all tender percentage.
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> The terms 'standard schedule of rates' used in the above sub-clauses (a), (b) & (c) means the schedule of rates on which the H sanctioned estimate was prepared.

(d) In the event of the Executive Engineer and the Contractor failing to agree on a rate for such additional work, the Executive Engineer may, at his option either: A

(i) employ other parties to carry out the additional work in the same manner as provided for under clause 48, or

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(ii) the contractor shall execute the work upon written orders from the Executive Engineer and the cost of labour and materials plus 10 per cent thereon shall be allowed therefor, provided that the vouchers for the labour and materials employed shall have been delivered to the Executive Engineer or his representative within seven days after such work shall have been completed. If the Executive Engineer considers that payment for such work on the basis of the vouchers presented is unduly high, he shall make payment in accordance with such valuation as he considers fair and reasonable and his decision to the matter shall be final, if the amount involved in additional payment is Rs.1000 or less, for each occasion on which such additional works shall have been authorised. If such amount exceeds Rs.1000, the contractor shall have the right to submit the matter to arbitration under the provisions of the arbitration clause 73. (e)If, in the opinion of the Executive Engineer a rate for the additional work is not capable of being properly arrived at prior to execution of work, or if the work is not capable of being properly measured, then the cost and payment thereof shall be dealt with as provided for in the preceding sub-clause (d)(ii)." C D E

In the case of *S. Harcharan Singh* v. *Union of India*, [1990] 4 SCC 647, on which Mr. Rao had strongly relied upon, this Court had quoted clause 12 of the agreement in paragraph 8 of the judgment and referring to the standard form of contract of the Central Public Works Department, specifically permitting for a limit of variation called "deviation limit" up to a maximum of 20 per cent, it was held that the contractor has to carry out the work at the rate stipulated in the contract upto such limit but for work in excess of that limit he has to be paid at the rates to be determined in accordance with clause 12A, under which the Engineer in-charge can revise the rates, having regard to the prevailing market rates. The Court also referred to the letters of the Executive Engineers, the Superintending Engineer and the Additional Chief Engineer recommending that the additional work may be confined to 20 per cent and for the extra quantity of additional work, he may be paid remuneration at the F G H

A increased rate taking into account the increased cost of the execution of work on account of peculiar nature of the work. We fail to understand how the aforesaid decision will be of any assistance to the claimant in the present case, where there is no clause like Clause 12A nor is there any letter from the competent authority agreeing to payment at a higher rate for the additional work beyond the limit of 25 per cent as provided under the GOMS No. 2289 dated 12.6.1968. Arbitrator being a creature of the agreement, unless agreement either specifically or inferentially provides for a higher rate to be awarded for any additional or excess work done by the contractor, it would not be permissible for the arbitrator to award for the so-called additional work at a higher rate. In the case in hand, not only there is no letter from the competent authority, namely the Superintending Engineer that the contractor would be paid at any higher rate for the additional excavation of rock, though the Executive Engineer had indicated that he has recommended to the Superintending Engineer. But such recommendation of the Executive Engineer, who was not competent to decide the question of awarding a higher rate for the excess quantity of excavation will not clothe any jurisdiction on the arbitrator to award the contractor at a higher rate nor would it entitle the contractor to get a higher rate for the claim in question on the basis of agreement. Now coming to the very clause, upon which Mr. Rao relied upon, we find that the said clause relates to supplemental item, which have been found essential, incidental and inevitable during the execution of the work. The excavation of hard rock cannot be held to be a supplemental item and on the other hand, is an item of work tendered and accepted, and as such clause 63 will have no application to the claim item No.1. Mr. Rao had also relied upon the decision of this Court in *National Fertilizers* v. *Puran Chand Nangia*, [2000] 8 SCC 343, wherein this Court had held that an interpretation of a particular clause of the agreement must be such, so as to balance the rights of both parties and when a variation clause permits the employer to make variation in the work upto a specified limit, beyond the said limit, the claimant could be paid at a higher rate. The Court in the aforesaid case was examining the principle of integrity of the contract and refused to interfere with the award merely because arbitrator had granted an escalation. In the aforesaid case, the Court was examining whether it would be permissible for interfering with an award which was a non-speaking one merely because the arbitrator had awarded the claim at an escalated rate for the excess quantity of work and since the award itself was a non-speaking award, the court held that it is not permissible to probe into the mental process of the arbitrator and then interfered with the same. Then again the question of granting a higher

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rate for any extra quantity of work executed by the contractor would at all arise only when the contract provides for such escalated rate either expressly or by implication as in the case of S. Harcharan Singh 1990(4) SCC 647, where the competent authority had agreed for the same by correspondence. But in the case in hand, when there is no such acceptance by the competent authority, and there is no provision in the contract, permitting such escalated rate for the additional quantity of excavation made and in view of our rejecting the contention raised on the basis of clause 63, the conclusion is irresistible that the contractor will not be entitled to a higher rate for the additional excavation work and as such the High Court was fully justified in setting aside the direction of the trial judge, remitting the claim item No. 1 for reconsideration and we see no infirmity with the said direction of the High Court to be interfered with. We also find sufficient force in the submission of Mrs. Amreswari, relying upon the letters of the competent authority, specifically intimating that the grant of extension of time will not in any way make the contractor eligible for any extra claim due to escalation in rates of labour and materials or due to any other reasons under any circumstances and the decision of this Court in *Ramalinga Reddy*, [1999] 9 SCC 610 supports the aforesaid contention. In the aforesaid premises, we do not find any merits in this appeal, requiring our interference with the impugned judgment of the High Court. The appeal fails and is dismissed but in the circumstances there will be no order as to costs.

A.K.T. Appeal dismissed.