IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 3089 and 3090 of 2006

Decided On: 17.09.2009

Som Datt Builders Ltd.
Vs.
State of Kerala

AND

State of Kerala
Vs.
Somdatt Builders Ltd.

Hon'ble Judges:
Tarun Chatterjee and R.M. Lodha, JJ.

JUDGMENT

R.M. Lodha, J.

1. These two appeals by special leave arise from the Judgment and Order dated June 3, 2005 passed by the High Court of Kerala and hence were heard together and are being disposed of by this common judgment.

2. The State of Kerala represented by the Chief Engineer, National Highway, Public Works Department awarded a contract to M/s. Som Datt Builders Limited (for short, `contractor') relating to road work of National Highway-47. The works were : (i) four laning and strengthening of Alwaye-Vyttila; (ii) four laning and strengthening of Vyttila-Aroor and (iii) four laning of Aroor-Cherthala stretches. The terms and conditions mentioned in the special and general conditions of the contract (Sections IV & III respectively) were integral part of the conditions specified in the contract. Under the contract, the contractor was to complete the works within forty-two months. That the work could not be completed within the agreed period is not in dispute. It is also an admitted position that the time for completion of work was extended on two occasions; in all by 25 months. The case of the contractor is that the extension of time was not for any fault of theirs and as a matter of fact they had to continue the site office in Cochin; that they also incurred additional expenditure in relation to their work at Cochin and that further expenditure towards equipment ownership charges in respect of the machinery worth crores of rupees continued to be employed for the work. The contractor, therefore, raised claims under diverse heads before the Engineer on February 22, 1998. According to the contractor, the Engineer took decision concerning claim No. 1 but the said decision was not implemented and regarding other claims, no decision was taken necessitating the contractor to seek reference of the dispute to arbitration.

3. On January 11, 1999 an arbitral tribunal comprising three Arbitrators was constituted and all claims of the contractor were referred for adjudication to the arbitral tribunal.

4. On March 20, 1999 the contractor submitted their claim along with supporting documents before the arbitral tribunal. Claim No. 1 made by the contractor related to additional cost on account of extended stay for reasons not attributable to them. Claim No. 1 as per statement of claim is under three heads, namely; (i) Equipment ownership charges for Rs. 10,43,49,369/-; (ii) Site over-heads for Rs. 9,16,31,609/- ; and (iii) Head Office over-heads for Rs. 2,45,68,507/-- totaling Rs. 22.05,40,405/-.

> Claim No. 4B amounting to Rs. 3,33,924.69 related to additional expenditure incurred due to change in foundation from well foundation to open foundation.
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> Claim No. 5 in the sum of Rs. 2,85,93,625/- was raised by the contractor towards compensation for the loss suffered on account of strikes by various local unions, bundh and interference by police and other authorities.
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> Claim No. 6 for Rs. 2,46,817/- was raised by the contractor for reimbursement of the provident fund contributed by the contractor @ 10%.

5. The statement of defence was submitted on behalf of the State Government along with supporting documents before the arbitral tribunal on October 30, 1999.
6. The contractor submitted its rejoinder on November 27, 1999 while an additional statement of defence was filed by the State Government on March 17, 2001.
7. The arbitral tribunal passed its award on December 20, 2003. As regards, claim No. 1, the arbitral tribunal awarded an amount of Rs. 7,61,41,460/-. The arbitral tribunal awarded a sum of Rs. 2,86,985.23 towards claim No. 4B; Rs. 1,00,26,900/- towards claim No. 5 and Rs. 2,31,821/- towards claim No. 6. It is not necessary to deal with the other claims as they are not the subject matter of these two appeals.
8. A petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, `Act, 1996') was filed by the State of Kerala before the District judge, Ernakulam for setting aside the award dated December 20, 2003 on diverse grounds, inter alia, that the award was not a reasoned award.
9. The 2nd Additional District Judge, Ernakulam to whom the case was transferred, dismissed the petition filed by the State of Kerala vide his judgment and Order dated February 23, 2005. He held that there were sufficient reasons recorded by the arbitral tribunal for allowing each claim.
10. The State of Kerala then approached the High Court by filing an appeal against the judgment and order of the 2nd Additional District Judge dismissing their petition under Section 34 of the Act, 1996.
11. The Division Bench heard the appeal and vide its judgment dated June 3, 2005 allowed the appeal in part and set aside the award relating to claim Nos. 1 and 4B on the ground that the findings thereon do not have supporting reasons being violative of Sections 28(3) and 31(3) of the Act, 1996. The Division Bench also set aside the interest awarded on these two counts claimed under claims 7B and 7C.
12. Both the parties are aggrieved by the judgment of the Division Bench. Civil Appeal No. 3089 of 2006 has been preferred by the contractor aggrieved by the said judgment to the extent the award relating to claim Nos. 1 and 4B has been set aside whereas Civil Appeal No. 3090 of 2006 is at the instance of the State of Kerala dissatisfied with the award relating to claim Nos. 5 and 6.
13. It is appropriate that few clauses of Conditions of the Contract referred to by the Learned Senior Counsel during the course of arguments are noticed by us first.

14. Clause 1.1 (a)(i) defines `Employer' as follows : "EMPLOYER" means the Governor of the State (India) or his successors in office and assigns. The Chief Engineer-in-charge of the Project will be the assignee for the Project."
15. Clause 1.1 (a)(iv) defines `Engineer' thus:

> "ENGINEER" means the Superintending Engineer of the PWD, appointed as the Project Director of this Contract or any other person appointed by the Employer, by notice in writing to the Contractor, to act in replacement of the Engineer.

16. The procedure for claims is set out in clauses 53.1 to 53.5 which read thus:

> 53.1 Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.
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> 53.2 Upon the happening of the event referred to in Sub-Clause 53.1, the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Employer's liability, the Engineer shall, on receipt of a notice under Sub-Clause 53.1, inspect such contemporary records and may instruct the Contractor to keep any further contemporary records as are reasonable and may be material to the claim of which notice has been given. The Contractor shall permit the Engineer to inspect all records kept pursuant to this Sub-Clause and shall supply him with copies thereof as and when the Engineer so instructs.
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> 53.3 Within 28 days or such other reasonable time as may be agreed by the Engineer, of giving notice under Sub-Clause 53.1, the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the grounds upon which the claim is based. Where the event giving rise to the claim has a continuing effect, such account shall be considered to be an interim account and the Contractor shall, at such intervals as the Engineer may reasonably require, send further interim accounts giving the accumulated amount of the claim and any further grounds upon which it is based. In cases where interim accounts are sent to the Engineer, the Contractor shall send a final account within 28 days of the end of the effects resulting from the event. The Contractor shall, if required by the Engineer so to do, copy to the Employer all accounts sent to the Engineer pursuant to this Sub-Clause.
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> 53.4 If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clauses 53.2 and 53.3).

> 53.5 The Contractor shall be entitled to have included in any interim payment certified by the Engineer pursuant to Clause 60 such amount in respect of any claim as the Engineer, after due consultation with the Employer and the Contractor, may consider due to the Contractor provided that the Contractor has supplied sufficient particulars to enable the Engineer to determine the amount due. If such particulars are insufficient to substantiate the whole of the claim, the Contractor shall be entitled to payment in respect of such part of the claim, as such particulars may substantiate to the satisfaction of the Engineer. The Engineer shall notify the Contractor of any determination made under this Sub-Clause, with a copy to the Employer.

17. As regards settlement of dispute, the relevant clauses are 67.1 to 67.4 which provide as follows:

> 67.1 If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.
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> Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.
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> If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided , as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

> If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.
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> 67.2. ...
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> 67.3. ...
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> 67.4 Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clauses 67.1 and 67.2 shall not apply to any such reference.

18. Mr. V.A. Mohta, learned senior counsel for the contractor submitted that the High Court was not justified in holding that no reasons have been assigned by the Arbitral Tribunal in support of their award in respect of claim Nos. 1 and 4B. He referred to : definitions of `Employer' and `Engineer'; Clause 7.1 ; communication dated April 23, 1998 from the Project Director to the Chief Engineer, PWD, National Highways (which according to him is a decision by the Engineer as regards claim No. 1) and the communication dated May 11, 1998 from the Chief Engineer to the Director General (Road), Ministry of Surface (Transport), New Delhi and submitted that delay in completion of work is admitted by the Employer to be not attributable to the contractor and, therefore no further reasons were required to be given by arbitral tribunal while passing an award for claim No. 1. Mr. V.A. Mohta also submitted that High Court erred in setting aside the award in respect of claim No. 4B even though valid reasons have been given in support of the said claim by the arbitral tribunal and the same are clearly discernible from the award itself. In the alternative, learned senior counsel submitted that if at all the High Court felt that there are no reasons in support of the award, it ought to have remitted the matter to the arbitral tribunal to give further reasons. In this regard, he relied upon Section 34(4) of the Act, 1996.

19. On the other hand, Mr. T.L.V. Iyer, learned senior counsel for the respondent supported the view of the High Court insofar as claim Nos. 1 and 4B are concerned. He, however, assailed the High Court's view with regard to claim Nos. 5 and 6 and submitted that the award in respect of these two claims are not supported by reasons and award is legally flawed to that extent.

20. It is true that communication dated April 23, 1998 sent by the Project Director to the Chief Engineer, National Highways does deal with claim No. 1 submitted by the Contractor on February 22, 1998 and he recommended overall equipment ownership charges and site over-heads for 12 months and further recommended the claim for Rs. 13,01,42,462/-. It is also seen that the Chief Engineer (employer) vide his communication dated May 11, 1998 to the Director General (Road), Ministry of Surface (Transport) referred to the aforesaid communication of the Project Director as a `decision' under Clause 67.1 by the Engineer and requested the Ministry of Surface (Transport) to settle the contractor's claim. Concededly, the aforesaid two

documents are referred to by the arbitral tribunal in the award and arbitral tribunal has also noticed the arguments advanced on behalf of the parties in support of their respective stand but reasons are not at all discernible in support of its finding that the period of completion was extended by the respondent for 18 = months due to reasons not attributable to the contractor. Having perused the award carefully, we have not been able to find reasons in support of claim No. 1. The position is no better in respect of award for claim No. 4B. As a matter of fact, no reason whatsoever has been assigned for awarding that claim.

21. Section 31(3) mandates that the arbitral award shall state the reasons upon which it is based, unless - (a) the parties have agreed that no reasons are to be given or (b) the award is an arbitral award under Section 30. That the present case is not covered by Clauses (a) and (b) is not in dispute. In the circumstances, it was obligatory for the arbitral tribunal to state reasons in support of its award in respect of claim Nos. 1 and 4B. By legislative mandate, it is now essential for the arbitral tribunal to give reasons in support of the award. It is pertinent to notice here that Act, 1996 is based on UNCITRAL Model Law which has a provision of stating the reasons upon which the award is based. In Union of India v. Mohan Lal Capoor (1973) 2 SCC 836, this Court said, `reasons are the links between the materials on which certain conclusions are based and the actual conclusions'.

22. In Woolcombers of India Ltd. v. Woolcombers Workers Union and Anr. AIR 1973 SC 2758, this Court stated:

> ...The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations....

23. In S.N. Mukherjee v. Union of India (1990) 4 SCC 594, the Constitution Bench held that recording of reasons:

> (i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise chances of arbitrariness in decision making.

24. Learned senior counsel for the contractor referred to a decision of Delhi High Court in the case of Delhi Electric Supply Undertaking v. Victor Cable Industries Limited and Anr. 2006 (1) Arb. LR-297 (Delhi) and submitted that where the arbitrator has referred to facts of the case and has noticed some reasoning which in view of Arbitrator was sufficient to arrive at conclusion for granting relief, award cannot be stated to be unreasoned. He also referred to yet another decision of Delhi High Court in the case of Kumar Construction Company v. Delhi Development Authority and Anr. 64 (1966) DLT 553 wherein it has been observed that the Arbitrator is not expected to write elaborate judgment and where Arbitrator has noticed contentions of the counsel, it cannot be said that Arbitrator failed in stating reasons for the award.

25. The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the

controversy by the arbitral tribunal. It is true that arbitral tribunal is not expected to write judgment like a court nor it is expected to give elaborate and detailed reasons in support of its finding/s but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the arbitral tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons must be stated by the arbitral tribunal upon which the award is based; want of reasons would make such award legally flawed. In what we have discussed above, it cannot be said that High Court was wrong in observing that no reasons have been assigned by the arbitral tribunal as to whether the period of completion extended by the employer for 18 = months was due to reasons not attributable to the claimant. However, in our view, the High Court ought to have given the arbitral tribunal an opportunity to give reasons. This course is available under Section 34(4) of the Act which reads thus:

> 1. ...
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> 2. ...
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> 3. ...
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> 4. On receipt of an application under Sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

26. We are informed by the learned senior counsel for the claimant that all the three persons constituting arbitral tribunal are available and if award is remitted to them for recording reasons, there should not be any impediment in their doing so. This course appears to us to be fair and reasonable.
27. The award under claim No. 5 is inter-related to claim No. 1. Objections to Claim No. 6 may also be re-examined by the Additional District Judge now since petition under Section 34 is being restored to the file of that court.
28. We, accordingly, dispose of these two appeals by the following order:

> (i) The judgment of the High Court dated June 3, 2005 and the judgment dated February 23, 2005 passed by the 2nd Additional District Judge, Ernakulam are set aside.
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> (ii) The petition (O.P. Arb. 71/2004) by the State of Kerala against the award dated December 20, 2003 is restored to the file of the 2nd Additional District Judge, Ernakulam for fresh hearing and consideration of the objections in respect of claim Nos. 1, 4B, 5 and 6.
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> (iii) However, the 2nd Additional District Judge, Ernakulam shall first remit the award to the Arbitral Tribunal for stating their reasons in support of claim Nos. 1 and 4B and after receipt of the reasons from the arbitral tribunal proceed with the hearing and disposal of objections .

(iv) Parties shall bear their own costs.