CONTINENTAL CONSTRUCTION CO. LTD.

*v.*

STATE OF MADHYA PRADESH

MARCH 7, 1988

[SABYASACHI MUKHARJI AND S. RANGANATHAN, JJ.]

*Arbitration Act, 1940—Whether a contractor can claim extra cost and compensation towards rise in prices of material and labour on account of delay on the part of other party to contract in discharge of its obligations and allotment of work under the contract and invoke arbitration clause in contract and ask for a reference to arbitrator under section 20—Of.*

**The petitioner in this application under Article 136 of the Constitution entered into a contract with the respondent State for construction work. The contract could not be completed within the stipulated time because of alleged gross delay on the part of the State in allotment of work and discharge of its obligations under the contract. The petitioner incurred unforeseen expenditure and approached the Superintending Engineer for payment. Upon refusal of the Superintending Engineer to pay and also to refer the matter to arbitration, the petitioner moved the District Judge under Section 20 of the Arbitration Act, ('the Act') for the filing of the arbitration agreement and for reference of the dispute to arbitration. The District Judge directed the respondent State to file the agreement, and made a reference for specific question to the arbitration. The High Court dismissed the State's appeal against the Order of the District Judge. Thereafter, an arbitrator was appointed, who made an award partly allowing the petitioner's claim. The award was filed in the Court of the District Judge, who made the award a rule of the court. The respondent appealed to the High Court. The High Court remanded the matter to the District Judge for a fresh decision. The District Judge accepted the respondent's objections and set aside the award. The High Court dismissed the appeal of the petitioner. The petitioner then moved this Court for relief by this petition for special leave.**

**Dismissing the petition, the Court,**

**HELD: The District Judge rightly found that the question regarding extra-cost was a general question and not a specific legal question and the decision of the arbitrator was not final. The arbitrator**

misconducted himself in allowing the claim without deciding the objection of the State. In view of the specific clauses, the petitioner was not legally entitled to claim for extra-cost. The decision of this Court in *Seth Thawardas* v. *Union of India,* [1955] 2 SCR 48—was of no avail on this point. If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. The arbitrator is not a conciliator and cannot ignore the law or mis-apply it in order to do what he thinks is just and reasonable. The arbitrator is a Tribunal selected by the parties to decide their disputes according to law and so he is bound to follow and apply the law, and if he does not, he can be set right by the Court provided his error appears on the face of the award. In this case, the contractor having contracted, could not go back to the agreement simply because it did not suit him to abide by it. [111C-F]

The petitioner had argued that since specific issues had been framed and referred by the District Judge to the arbitrator, the same had been answered by a non-speaking award and there was no mistake of law apparent on the face of the record, and the District Judge had erred in setting aside the award by looking into the terms of the contract which neither formed part of the award nor were appended to it. The Court did not agree. This being a general question, the District Judge rightly examined the question and found that the petitioner was not entitled to claim for extra cost in view of the terms of the contract, and the arbitrator misdirected himself by not considering this objection of the State before giving the award. [112B-C]

The limits of the jurisdiction of the Court to challenge the award are well-settled. While considering the objection under section 30 of the Act, the Court does not act as an appellate Court; it can only interfere with the award if the arbitrator misconducts himself or the proceedings or if the award has been made after the issue of an order by the Court superseding the arbitration or if the arbitration proceedings have become invalid under section 35(c) of the Act, or the award has been improperly procured or is otherwise invalid. If, a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit it being set aside. [112E-F; 113A]

The High Court was right that the District Judge was entitled to examine the contract in order to find out the legality of the claim of the petitioner regarding extra cost towards rise in prices of material and

**labour. Clauses 2.16 and 2.4 stipulated that the contractor had to complete the work inspite of rise in prices of materials and also rise in labour charges at the rates stipulated in the contract. There was a clear finding of the arbitrator that the contract was not rendered ineffective in terms of section 56 of the Contract Act due to the abnormal rise in prices of materials and labour. This being so and the contractor having completed the work, it was not open to him to claim extra cost towards rise in prices of material and labour. The arbitrator misdirected himself in not deciding this specific objection raised by the State regarding the legality of the extra claim of the petitioner. It has to be born in mind that there were specific clauses which barred consideration of extra claims in the event of price escalation. [113D-F; 114B]**

**The award was properly set aside by the District Judge and the High Court was right in the view it took and there was no ground to interfere. [113G]**

*Seth Thawardas* **v.** *Union of India,* **[1955] 2 SCR 48;** *M/s Alopi Parshad* **v.** *Union of India,* **[1960] 2 SCR 793;** *Kapoor Nilokheri Co-Operative Dairy Farm Society Ltd.* **v.** *Union of India,* **A.I.R. 1973 S.C. 1338;** *Champsey Bhara and Co.* **v.** *Jivraj Balloo Spinning and Weaving Co. Ltd.,* **A.I.R. 1923 P.C. 66;** *Re. King and Duveen,* **[1913] 2 K.B. 32;** *Government of Kelantan* **v.** *Duff Development Co. Ltd.,* **[1923] AC 395;** *Bungo Steel Furniture* **v.** *Union of India,* **[1967] 1 SCR 633;** *Saleh Mohd.* **v.** *Nathoo Mal,* **54 I.A. 427;** *Abosalom Ltd.* **v.** *Great Western,* **[1933] A.C. 592;** *Allen Berry & Co.* **v.** *Union of India,* **[1971] 3 SCR 282 and** *Tarapare and Company* **v.** *Cochin Shipyard Ltd., Cochin and Anr.,* **[1984] 2 S.C.C. 680, referred to.**

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 13180 of 1985.

From the Judgment and Order dated 17.4.1985 of the Madhya Pradesh High Court in Misc. F.A. No. 252 of 1981.

S.N. Kacker and R. Ramachandran for the Petitioner.

The Judgment of the Court was delivered by

**SABYASACHI MUKHARJI, J.** This is an application under Article 136 of the Constitution for leave to appeal to this Court from the judgment and order of the High Court of Madhya Pradesh dated 17th April, 1985. In order to appreciate the points involved, it is neces-

A sary to state that the petitioner entered into a contract dated 31st March, 1970 with respondent, State of Madhya Pradesh for the construction of Rip Rap on right bund of Masonary Dam of Tawa Project. The contract could not be completed within the stipulated time because of alleged gross delay on the part of the State, according to the petitioner, in allotment of work and discharge of its obligations B under the contract. The petitioner incurred unforeseen expenditure, it is claimed, to the tune of Rs.5,29,812 and approached the Superintending Engineer for payment. Upon refusal of the Superintending Engineer to pay the claim and his refusal to refer the matter to arbitration, the petitioner moved the learned District Judge under section 20 of the Arbitration Act, 1940 (hereinafter called 'the Act') for filing of the arbitration agreement and for reference of the disputes to the C arbitration. On 24th April, 1976 the learned District Judge allowed the petitioner's application and directed the respondent, State of Madhya Pradesh to file the agreement in Court and made a reference for specific question to the arbitration. The High Court on 22nd September, 1976 dismissed the State's appeal against the order of the D District Judge. Thereafter in March, 1977 Retired Engineer-in-Chief, P.W.D. Bhopal was appointed arbitrator. There was an award dated 29th October, 1978 on all the issues referred, partly allowing the petitioner's claim. The award was filed in the Court of the District Judge and the respondent filed objections to the award under sections 30 and 33 of the Act and the petitioner filed replies. The District Judge E made the award a rule of the Court. The respondent appealed to the High Court. The High Court remanded the matter to the District Judge for fresh decision. The District Judge accepted the objections and set aside the award. The High Court by the impugned judgment dismissed the appeal of the petitioner. It is from this judgment of the High Court that the petitioner seeks leave to appeal to this Court.

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As mentioned hereinbefore by the impugned judgment and order of the High Court the award has been set aside. The agreement contained an arbitration clause. The work, however, could not be completed within the stipulated time, the period of contract was extended. The contractor attributed delay on the part of the State G Government whereas the State Government blamed the contractor. This was a disputed question. While the work was in progress, the contractor was required to meet extra expenditure on labour charges and materials due to revision in wage scales and escalation of prices. Alterations and substitutions of works also led to extra expenses. There were certain items for which rates were not provided but all the H samework had to be done. The contractor therefore, advanced claims

for compensation. The Superintending Engineer dismissed the claims on the ground that the claims were barred under clause 3.3.15. He also held that some of the claims were not covered by the contract. The contractor sought to invoke the arbitration clause but the State sought to oppose on the ground that the dispute attracting the arbitration clause had not arisen. It was contended that the claim was barred by clause 3.3.15 and it had not been made within the time. It was contended further that there was only one contract and there being no separate agreement for extension of period of the contract the rate as provided in the original contract alone was permissible. As there was no separate contract and no reference under clause 3.3.29 could be made for the enhanced period beyond the period of the contract. Relevant clauses of the contract were as follow:

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"3.3.15 Clause 15. Time limit for unforseen claims: Under no circumstances whatever shall the contractor be entitled to any compensation from Government on any account unless the contractor shall have submitted claim in writing to the Engineer–in–Charge within one month of the cause of such claim occurring.

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3.3.29 Clause 29.

Decision of Superintending Engineer, to be final except where otherwise specified in the contract. The decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all parties to the contract upon all question relating to the meaning of the specification, design drawings and instructions hereinbefore mentioned and as to the quality of workmanship or material used on the work or as to any other question, claim, right matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or those conditions or otherwise concerning the work of execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof.

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Provided that if the contractor is dissatisfied with the final decision of the Superintending Engineer in respect of any matter, he may within 28 days after receiving notice of such decision give notice in writing to the Superintending

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A Engineer requiring that the matter may be referred to the arbitration and furnishing detailed particulars of the dispute or difference specifying clearly the point at issue. If the contractor fails to give such notice within the period of 28 days as stipulated above the decision of the Superintending Engineer already given shall be conclusive and binding on the contractor.

In case an arbitration is to be held it shall be effected by an arbitrator to be appointed by the State Government whose decision shall be final, conclusive and binding.

C If the work under the contract has not been completed when a dispute is referred to arbitration work shall continue during arbitration proceedings if it is reasonably possible and no payment due to contractor should be withheld on account of arbitration proceedings unless it is required by the arbitrator

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3.3.32 Clause 32. Action where no specification:

In case of any class of work for which there is no such specification as is mentioned in Rules, such work shall be carried out in accordance with the specification approved by Superintending Engineer/Chief Engineer, or application to works in the district and the event of there being no such specification, then in such case the work shall be carried out in all respect in accordance with the instructions and requirements of the Engineer–in–Charge.

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3.3.33 Clause 33. Definition of work:

The expression "works" or "work" where used in these conditions shall, unless there by something either in the subject or context repugnant to such construction be constructed and taken to mean the works by or by virtue of the contract contracted to be executed, whether temporary or permanent, and whether original, altered, substituted or additional.

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3.3.34 Clause 34. Claim for quantities entered in the tender or estimate:

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Quantities shown in the tender are approximate and no claim shall be entertained or work executed being either more or less than those entered in the tender estimate." A

The learned single Judge as mentioned hereinbefore of the High Court after exhaustive discussion dismissed the appeal and upheld the order. Being aggrieved the petitioner went up in appeal before the B Division Bench and the Division Bench on consideration of the matter dismissed the appeal. The Division Bench considered the following issues raised before the District Judge:

1. Whether the contractor had incurred extra-costs towards wetting and washing of stones used in masonry of Group–II Tawa Masonry Dam? C

2. Was the petitioner entitled to payment of this extra costs of Rs.1,20,355?

3. Whether the petitioner contractor had to incur extra cost of D material and labour to the tune of Rs.14,72,456 within the contract period for executing work assigned to it?

4. Whether the contractor had incurred extra cost of Rs.8,84,336 for the work beyond the contract period due to unforeseen circumstances? E

5. Whether the petitioner's claim on both the counts was in whole or in part of it was barred by time in terms of clause 3.3.15?

6. Whether the contract was rendered ineffective in terms of F section 56 of the Contract Act due to unexpected change in the market rate of material and labour charges?

7. Was the claim not entertainable in accordance with the terms of the contract under clause 3.3.32, 3.3.33 and 3.3.34 during the extended period of contract? G

8. Was the work delayed because of the presence of shale–zone in the foundation which factor was not made known to the contract?

9. Whether the contractor was entitled to extra costs of damages H

for the delay caused on account of shale–zone?

The Division Bench came to the findings as follows:

1. The contractor did incur expenditure on wetting and washing of stones in Masonry Group–II, Tawa Masonry Dam but this was according to agreement.

2. The petitioner is not entitled to the payment of the extra costs of Rs. 1,20,355.

3. The petitioner/contractor did incur an extra cost of Rs. 14,72,456 within the contract period for executing the assigned work.

4. The petitioner/contractor did incur an extra cost of Rs.6,81,796 for the work done beyond the contract period due to unforseen circumstances.

5. The petitioner is entitled to the claim to the extent of Rs.2,65,000 against Issue No. 3 and Rs.6,81,796 against Issue No. 4 above and the same is not barred by time in terms of clause 3.3.15.

6. The contract was not rendered ineffective in terms of section 56 of the Contract Act due to abnormal rise in the market rates of materials and labour.

7. The claim under reference cannot be ruled out merely because of the provisions of clause 3.3.32, 3.3.33 and 3.3.34.

8. Yes, the work was delayed due to the presence of shale–zone in the foundations, a factor which was unforeseen and was not made known to the contractor.

9. The contractor is entitled to claim extra cost due to the delay caused on account of the shale–zone in foundations.

The Division Bench felt that the four factual issues decided by the District Judge were more or less by the agreement and therefore, the Division Bench did not deal with these. So far as three legal issues which were referred to him, namely, whether the claim was barred under clause 3.3.15, the contract was rendered ineffective in terms of

section 56 of the Contract Act due to abnormal rise in the market rate of material and labour and the claim not entertainable under clause 3.3.32, 3.3.33 and 3.3.34. The High Court considered whether the appellant was entitled to extra cost towards rise in prices of materials and labour within and beyond the contract period. The Division Bench noted that the learned District Judge held that since three legal issues were specifically referred to the arbitrator and therefore his decision had become final and binding on the parties and cannot be re-agitated before the Court. Regarding the remaining issues, the State had taken objection while opposing the application under section 20 that the appellant was not entitled to extra cost for material and labour in terms of the contract but the Court directed that this matter had to be agitated before the arbitrator and the application under section 20 could not be dismissed on the ground that the claim would not ultimately succeed. The District Judge found and in our opinion rightly that the question regarding extra-cost was a general question and not a specific legal question and the decision of the arbitrator was not final one. The arbitrator misconducted himself in allowing the claim without deciding the objection of the State. In view of the specific clauses, the appellant was not legally entitled to claim for extra cost. The decision of this Court in *Seth Thawardas* v. *Union of India,* [1955] 2 SCR 48 is of no avail on this point. If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentially. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not he can be set right by the Court provided his error appears on the face of the award. In this case, the contractor having contracted, he cannot go back to the agreement simply because he does not suit him to abide by it. The decision of this Court in *M/s. Alopi Parshad* v. *Union of India,* [1960] 2 SCR 793 may be examined. There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general

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liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous.

It was argued on behalf of the appellant that since specific issues were framed and referred by the District Judge to the arbitrator, the same had been answered by a non-speaking award, there is no mistake of law apparent on the face of record and the District Judge erred in setting aside the award by looking into the terms of the contract which, it was submitted, neither formed part of the award nor appended to it. We are unable to agree. This being a general question, in our opinion, the District Judge rightly examined the question and found that the appellant was not entitled to claim for extra cost in view of the terms of the contract and the arbitrator misdirected himself by not considering this objection of the State before giving the award.

In *Kapoor Nilokheri Co-operative Dairy Farm Society Ltd.* v. *Union of India,* A.I.R. 1973 S.C. 1338, it was held that where an arbitrator is called upon to decide the effect of the agreement, he has really to decide a question of law, i.e. of interpreting the agreement, and hence, his decision is not open to challenge. This was also a decision against a reasoned award but since the reference was to a specific question of law, the decision of the arbitrator, it was held, was not open to challenge. The limits of the jurisdiction of the Court to challenge the award are well-settled. While considering objection under section 30 of the Act, the Court does not act as an appellate court, it can only interfere with the award if the arbitrator misconducts himself or the proceedings or if the award has been made after the issue of an order by the Court superseding the arbitration or if the arbitration proceedings have become invalid under section 35(c) of the Act or the award has been improperly procured or is otherwise invalid. The Judicial Committee in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co. Ltd.,* A.I.R. 1923 P.C. 66 has laid down the extent of the jurisdiction of the Court to set aside an award on the ground of an error in making the award. It has been reiterated that the award of the arbitrator may be set aside on the ground of an error on the face thereof only when in the award or in any document incorporated with it as for instance, a note appended by the arbitrator, stating the reason for his decision, there is found some legal proposition which is the basis of the award and which is erroneous. See also in this connection *Re. King & Duveen,* [1913] 2 K.B. 32 and *Government of Kelantan* v. *Duff Development Co. Ltd.,* [1923] A.C. 395, if how-

ever, a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit of it being set aside. See also the observations of this Court in *Bungo Steel Furniture* v. *Union of India*, [1967] 1 SCR 633. It is well settled that the contract remained part of the award. The Judicial Committee in *Saleh Mohd.* v. *Nathoo Mal*, 54 I.A. 427 considered an award in which the arbitrator recited a contract made between the parties and the dispute arising under it. It was contended that the contract was incorporated in the award by its reference and so the award disclosed an error of law in construing the terms of the contract. But that contention was negatived. It was held that the reference to the contract in the award was to earmark the disputes between the parties and was not incorporated into the award. In *Abosalom Ltd.* v. *Great Western*, [1933] A.C., 592, it was held that if an award referred to the terms of a clause in the contract, the clause though not set out in full must be taken to be incorporated in it. This Court has reiterated in *Allen Berry & Co.* v. *Union of India*, [1971] 3 SCR 282 that mere reference to the contract in the award is not to be held as incorporating it.

In the aforesaid light, we are of the opinion, the High Court was right that the District Judge was entitled to examine the contract in order to find out the legality of the claim of the appellant regarding extra cost towards rise in prices of material and labour. As was pointed out by the learned District Judge clauses 2.16 and 2.4 stipulated that the contractor had to complete the work inspite of rise in prices of materials and also rise in labour charges at the rates stipulated in the contract. There was a clear finding of the arbitrator that the contract was not rendered ineffective in terms of section 56 of the Act due to abnormal rise in prices of material and labour. This being so and the contractor having completed the work, it was not open to him to claim extra cost towards rise in prices of material and labour. The arbitrator misconducted himself in not deciding this specific objection raised by the State regarding the legality of extra claim of the appellant.

In that view of the matter, the award, in our opinion, was properly set aside by the learned District Judge and the High Court was right in not interfering with it.

The question about specific reference on a question of law was examined by this Court recently in the case of *Tarapore and Comapny* v. *Cochin Shipyard Ltd., Cochin and another*, [1984] 2 S.C.C. 680. There it was observed that if the agreed fact situation, on the basis of

A which agreement was entered into, ceases to exist, the agreement to that extent would become otiose. If rate initially quoted by the contractor became irrelevant due to subsequent price escalation, it was held in that case that contractor's claim for compensation for the excess expenditure incurred due to the price rise could not be turned B down on ground of absence of price escalation clause in that regard in the contract. Agreement as a whole has to be read. Reliance was placed very heavily on this decision on behalf of the appellant before us. It has to be borne in mind that in the instant case there are specific clauses referred to hereinbefore which barred consideration of extra claims in the event of price escalation. That was not so in *Tarapore and Company's* case. That made all the difference. The basis of bargain C between the parties in both these two cases were entirely different.

In the aforesaid view of the matter we are of the opinion that the High Court was right in the view it took and there is no ground to interfere. The petition for special leave fails and is accordingly D dismissed.

S.L. Petition dismissed.