

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (Civil) No(s).13876/2010

(From the judgement and order dated 15/12/2009 in AA No.16/2009 dated 16/12/2009 in AA No.16/2009 of The HIGH COURT OF BOMBAY AT AURANGABAD)

STATE OF MAHARASHTRA TR.EXEC.ENG.

Petitioner(s)

VERSUS

M/S S.D.SHINDE & CO.

Respondent(s)

(With appln(s) for permission to file additional documents and office report))

(For final disposal)

Date: 22/08/2013 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE T.S. THAKUR

HON'BLE MR. JUSTICE VIKRAMAJIT SEN

For Petitioner(s)

Mr. B.H.Marlepalle, Sr. Adv.
Mr. Sudhanshu S.Choudhari, Adv.
Mr. Vatsalya Vigya, Adv.
Mr. Ajit Wagri, Adv.

For Respondent(s)

Mr. V.A.Mohta, Sr. Adv.
Mr. Shashibhushan P.Adgaonkar, Adv.
Mr. Nilakanta Nayak, Adv.
Mr. Ashok Kumar Gupta Ii, Adv.

UPON hearing counsel the Court made the following
O R D E R

Leave granted.

The appeal is allowed in part and disposed of in terms of the signed order.

|(Shashi Sareen)
|Court Master

| |(Veena Khera)
| |Court Master

(Signed order is placed on the file)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 7002 OF 2013
(Arising out of SLP(C) No. 13876 of 2010)

|STATE OF MAHARASHTRA TR. EXEC. ENG.

|.. | Appellant(s)

Versus

O R D E R

Leave granted.

This appeal arises out of an order dated 15/16 December, 2009 passed by the Aurangabad Bench of High Court of Judicature of Bombay whereby Arbitration Appeal No. 16 of 2009 filed by the appellant was allowed and the order passed by the Joint Civil Judge, Senior Division, Nande set aside with a direction to the Civil Judge to make the arbitral award a rule of the court by allowing the application filed by the respondent in that regard.

The respondent is a civil contractor who was in terms of work order dated 19.12.1987 allotted a contract for execution of earth work, lining and structure from KM 82 to 85 of Issapur Right Bank Canal in the State of Maharashtra. The contracted work had to be completed within a period of thirty months. The respondent failed to complete the work despite three extensions given to him up

to 30.09.1992 for doing so. The appellant was therefore forced to terminate the contract, withdraw the work from the respondent in terms of clause 45 of the agreement executed between the parties. Joint measurements of the work done by the respondent were recorded which according to the appellant revealed that a sum of Rs. 11,55,674/- had been paid in excess to him. The incomplete work was in due course allotted to another contractor who completed the same but only at an additional cost of Rs. 43,47,878/-.

Aggrieved by the withdrawal of the work from him the respondent contractor appears to have filed RCS No.143 of 1999 which was dismissed for default on 23.8.1994. An application for restoration too failed and was dismissed on 01.08.1997. The respondent contractor had it appears in the meantime invoked clause 51 of the tender agreement for settlement of the disputes that had arisen between the parties. The Executive Engineer examined the disputes and the claims raised by the Contractor and turned the same down by a communication dated 16.06.1994. The appellant's case is that an appeal preferred before the Superintending Engineer against the said order of rejection was dismissed by the Superintending Engineer on 04.07.1994. This appear to have left no option for the contractor but to invoke clause 52 contained in the agreement executed between the parties that provided for adjudication of the disputes by way of arbitration. The Chief Engineer however failed to act in terms of the said provision whereupon the respondent contractor submitted a penal of three names in terms of his communication dated 31.12.1994 requesting the Chief Engineer to pick up one of those nominated in the penal to act as an arbitrator. Since the Chief Engineer failed to do even that the contractor appointed Shri S.S.Dandewate a retired Superintending Engineer as the sole Arbitrator to adjudicate upon the disputes.

The arbitrator entered upon the reference and eventually made an award on 30.04.1998 according to which the arbitrator found the respondent contractor entitled to a total sum of Rs. 31,16,751/- towards principal which was made payable with interest @ 18% p.a. w.e.f. 01.02.1993 till the making of the actual payment. The award dealt with the claims of the respondent the contractor under the following heads and allowed the same to the extent indicated against each::

Claim No. 1	Extra Items	Rs. 20,96,677
Claim No. 2	Revision of rates due to reduction in quantities	Rs. 29,455
Claim No. 3	Revision of rates due to increase in quantity	Rs. 4,17,000
Claim No. 4	Revision of rates due to change in scope of work	Rs. 90,334

Claim No. 5	Revision of rate for work	Rs. 3,71,000
-------------	---------------------------	--------------

	in extended period	
Claim No. 6	Withheld payments	Rejected
Claim No. 7	Loss in profit and Overhead Charges	Rs. 1,12,285
Claim No. 8	Loss due to illegal action	Rejected
	Total	<u>31,16,751</u>

Interest from 1st Feb 1993 to end of April 1998 at 18PPA	29,45,319
	<u>Rs. 60,62,080</u>

The award was filed by the arbitrator before the Civil Judge, Senior Division, Nande who issued notice to the parties, in response to which the appellant filed its objections on 11.09.1998. The objections inter alia raised the question of validity of the procedure adopted for making the reference to arbitration as also the validity of the award which was according to the appellant unsupported by reasons, no matter the Arbitrator was in terms of the arbitration clause under an obligation to make a reasoned award. The Civil Judge Senior Division Nande found favour with these objections and came to the conclusion that the award was indeed illegal and unsustainable. By his order dated 23.6.2004 the Civil Judge, Senior Judge accordingly set aside the award made by the Arbitrator.

Aggrieved by the order of Civil Judge, Senior Division, the respondent contractor preferred Arbitration Appeal No. 16 of 2009 before the Aurangabad Bench of the High Court of Judicature of Bombay.

The High Court has in terms of the order impugned before us allowed the said appeal and set aside the order passed by the trial court with a direction to the trial court to make the same a rule of the court by allowing the application filed by the contractor in that regard.

We have heard learned counsel for the parties at considerable length. Appearing for the appellant Mr. Babu Marlepalle, learned senior counsel urged three distinct points before us for our consideration. It was in the first place contended by the learned counsel that the contractor had invoked the arbitration clause beyond the period of thirty days stipulated under clause 52 of the agreement executed between the parties. He urged that the effect of the failure of the respondent contractor to invoke the arbitration clause within the stipulated period was that the view taken by the Executive Engineer and the Superintending Engineer attained finality and thereby placed the same beyond the purview of arbitration under clause 52.

It was secondly contended by learned counsel that on a true and correct interpretation of clause 52 of the agreement, an arbitrator could be appointed only out of serving officers of the rank of Superintending Engineer of the State Government. Instead of appointing a serving Superintending Engineer the respondent contractor had nominated a retired officer as an Arbitrator which was according to the learned counsel impermissible. It was thirdly contended that the award made by the Arbitrator in favour of the respondent contractor was non speaking inasmuch as several items particularly those touching upon the rates admissible to the contractor and the quantum of work executed by him had been enhanced or altered without the arbitrator indicating any justification for such enhancement or alteration. It was urged that the arbitration clause itself required the Arbitrator to make a speaking award in all cases where the claim exceeded Rs. 1,00,000/-. The failure of the arbitrator to do so had the effect of rendering the award illegal and unsustainable in law. It was lastly contended by learned counsel for the appellant that the Arbitrator had awarded interest @ 18% p.a. w.e.f. 01.02.1993 that is the date of the making of the first claim by the contractor. The High Court had while upholding the award overlooked the fact that the rate of interest had to be reasonable keeping in view the bank rate of interest prevalent during the

relevant period.

Mr.V.A.Mohta, learned senior counsel appearing for the respondent-contractor on the other hand contended that the invocation of the arbitration clause was perfectly justified and within the period stipulated under the contract. It was also contended by learned counsel that on a true and proper construction of the clause the appointment of a retired officer who had held the rank of Superintending Engineer in the State Government was not excluded or debarred. It was in particular contended that the State Government had itself interpreted and understood clause 52 in that manner and either appointed or agreed to the appointment of a retired officer as Arbitrator in similar circumstance. Reference in this regard was made by the learned counsel to the averments made in the counter affidavit in which particulars of cases where retired officers had been appointed as Arbitrators have been made but not specifically repudiated in the rejoinder affidavit filed by the appellant. Mr. Mohta further argued that the award was a speaking award and that there was sufficient justification given by the Arbitrator for enhancing the rate or altering the quantities wherever such an enhancement or alteration was considered reasonable. There was therefore no room for interference with the award on those counts contended learned counsel. As regards the rate of interest Mr. Mohta submitted that although the Arbitrator and the High Court had awarded and affirmed interest @ 18% p.a. the respondent contractor was agreeable to moderation of the said rate to an extent it was considered reasonable by this court.

We have given our anxious consideration to the submission made at the Bar. The contract as noticed earlier was allotted to the respondent contractor way back in December, 1987. Even the remainder of the work left by the respondent contractor on account of his alleged non-performance was completed sometime in October, 1992. Arbitration proceedings started before the Arbitrator nominated by the respondent contractor in the year 1995. More than 20 years since the termination of the contract and 25 years since the allotment of the work have thus rolled by. It is true that the appellant has at different stages of the proceedings before the Arbitrator agitated issues relating to the procedure adopted for making of the reference and nomination of the Arbitrator. But it is equally true that the appellant has been all along participating in those proceedings and merrily gone through the entire process of right up to the stage of making of the award. It is evident not only from the pleadings of the parties but also from a reading of the award that the parties were heard on merits and given fullest opportunity to present their respective versions before the Arbitrator. Under the circumstances and having regard to the fact that the award made by the Arbitrator is a reasoned order which substantially if not strictly complies with the requirement of the arbitration clause, we do not consider the present to be a fit case in which we ought to interfere with the award of the principal amount of Rs. 31,47,591/- towards the claims made by the contractor the details whereof have been set out in the earlier part of this order. We had at one stage toyed with the idea of remitting the matter back to an independent Arbitrator like a Former Judge of the High Court for a fresh adjudication having regard to the questions that were urged on behalf of the appellant as to the validity of the procedure and also the competence of a retired Superintending Engineer to act as an Arbitrator but keeping in view the fact that over two decades have already been spent in the adjudication of the disputes and a fresh round of adjudication followed by litigation would also take considerable time we have decided against that course of action. In fairness to Mr. Babu Marlapalle we must mention that even he was not very enthusiastic about a fresh reference being made to a retired Judge of the court and rightly so because the process of adjudication can go on indefinitely in that case. In the totality of these circumstances we do not consider it proper to interfere with the award made by the Arbitrator or the order passed by the High Court affirming the same insofar as the principal amount of Rs. 31,16,751/- is concerned. To that extent the award as also the judgment of the High Court are affirmed leaving the questions raised at the Bar by learned counsel for the appellant as to the procedure that may be

followed in making such references and the persons who can be nominated as Arbitrators on a true and correct interpretation of clause 52 open to be determined in an appropriate case. Needless to say that the reasons recorded by the High Court in affirming the award made by the Arbitrator would also not constitute a procedure for the future.

Having said so we cannot help saying that the award of interest @ 18% p.a. w.e.f. 01.02.1993 was on the higher side and would require moderation. Mr. Mohta argued that award of interest predecree/pendente lite and future are in the discretion of the Arbitrator or the court as the case may be. At the same time it is also true that the rate of interest has to be reasonable. Generally speaking the rate of interest is guided by the rate of interest offered by banks during the relevant period. There is in the present case no evidence to prove the rate of interest prevalent during the period the contract was allotted or the arbitration proceedings were in progress. What is clear is that the estimated value of the contract was Rs. 80,00,000/- and the contractor had been paid an amount of Rs. 60 lakhs. If the work had been completed as it was expected of the contractor, he may have been entitled to another Rs. 20 lakhs or so besides payment for any extra items that he may have executed as against that amount the contractor respondent is now being paid a much higher amount.

In the totality of these circumstance therefore we are inclined to reduce the rate of interest awarded by the Arbitrator and affirmed by the High Court from 18% to 6% recokned from 01.02.1993. The award as also the judgment of the High Court shall to that extent stand modified with the condition that in case the amount payable to the respondent contractor is not paid within three months from today, the contractor shall be entitled to claim interest @ 10% on the principal amount of Rs. 31,16,751/- w.e.f. the date the period of three months expire.

The appeal is with the above directions allowed in part and disposed of leaving the parties to bear their own costs.

.....J.
(T.S.THAKUR)

.....J.
(VIKRAMAJIT SEN)

New Delhi,
August 22, 2013