

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION  
CIVIL APPEAL NO.4789 OF 2008

M/s. S.R. Ghosh ..Appellant

versus

Union of India ..Respondent

WITH

CIVIL APPEAL NO. 4790 OF 2008  
CIVIL APPEAL NO. 4791 OF 2008

O R D E R

Civil Appeal No. 4789 of 2008

1. The Chittaranjan Locomotive Works at Chittaranjan, West Bengal floated a tender by issuing a tender notice dated 18.01.1996 for "repairs of leaky roof in staff quarters and service buildings at Chittaranjan by Bitumen Tar-felting under Colony No.I", during 1995-1996. M/s S.R. Ghosh, the appellant herein, was the successful tenderer. It is therefore, that the respondent accepted the appellant's offer, through a formal letter dated 10.05.1996.

2. An important component namely the raw material for executing the contract was bitumen. The appellant received information about a notification dated 3.7.1996 of the Central Government, which increased the price of petroleum products including bitumen. It is pointed out that the erstwhile price of bitumen of Rs.5,700/- per metric tonne was revised to Rs.7,400/- per metric tonne. On the issue of a consequential impact of price

rise, the first communication addressed by the respondent to the appellant was dated 15.07.1996. An extract of the aforesaid communication is reproduced hereinbelow:

"Please refer your above cited letter addressed to this office. You have awarded the work of repair of leaky roofs by proving bitumen tarfelt in staff qrs. Under IOW/Col-I, Col-II, Col-III vide above mentioned letters dated 10.05.1996. It is worth to note that you had sufficient time for last two months to arrange bitumen and tarfelt and other materials. It was requested to you to start the work immediately but it is regretted that due to failure at your end the progress of work NIL for the last two months.

Under such circumstances the Railway is not responsible if there is any loss due to hike in the cost of labour and materials required in the work. As such the contract does not have any clause of price variation and all the accepted rates of the agreement are binding upon both parties. Notwithstanding any rise or fall in the rate of labour and materials, the agreed noted of the contract shall not be affected.

Therefore, you are requested to please improve the progress of work by arranging sufficient labour and materials immediately."

(emphasis is ours)

A perusal of the letter addressed by the respondent clearly reveals, that the respondent pointedly brought to the notice of the appellant, that it would not be responsible for the loss incurred by the appellant, on account of the price variation, and further, that the rates expressed in the agreement were binding on the parties.

3. The letter of the respondent dated 15.07.1996 was responded to by the appellant on 22.07.1996. The position assumed by the appellant needs a careful examination. Relevant part of the

same is accordingly extracted below:

"That Sir, the second claim of the Dy.CE(M)/ CLW also does not hold as he states that the Railway is not responsible for hike in cost of labour or materials. It may be noted in this connection that the contract states that the Railway shall not be responsible for or due to fluctuations in the market prices but in this instant case it is not a case of fluctuation of market price but a statutory increase made vide a Government notification. This is surely not a case of personal opinion but a point of law. The photo copy of the letter of Dy. CR(M)CLW is enclosed and marked as Annexure 'C' for identification.

That Sir, may we beg to mention that in similar nature of works and under similar circumstances under Eastern Railway we have been given awards by Arbitrators in four contracts. The awards are enclosed and marked collectively as Annexure 'D' for identification.

May we thus request your kind self to look into the matter and most hopefully we await your judicious as this increase in prices of petroleum product had created a situation wherein we are unable to maneuver ahead without your confirmation that escalation shall be granted to us on a analysis of rates taking into consideration the prevalent rates of bitumen and tarfelt in relation to rates prior to the effects of the increase. Any necessary documents shall be produced before your good self as and when desired.

Thanking you in anticipation and awaiting a favourable and early response. We remain."

(emphasis is ours)

The position assumed by the appellant was, that the fluctuation of the price of the bitumen was not a consequence of market fluctuation, but a statutory increase made by a government notification. The appellant also relied on 4 such awards rendered in its favour in similar circumstances. The appellant accordingly

positioned itself by asserting that the rates expressed in the agreement would not be binding, since the price rise was not a matter of market fluctuation.

4. A further development in the matter emerges from letter dated 13.09.1996, which the appellant addressed to the respondent. The text of the above letter is reproduced below:

"Sub : Signing of Contract Agreements.

May we Sir, beg to inform that we have been informed by the Tender Section of your department that the Contract Agreements for the aforesaid works are ready for signing.

Please note in this connection, that signing of the Contract agreement by us shall in no way effect our demand for claim for escalation of rates made vide our letter dated 06.7.96, 22.7.96, 19.8.96 and 11.9.96. The signing of the agreement is a formality to enable us to receive on account payments for works done but the rates incorporated in the agreement is not final and binding on us and shall have to be decided by the competent authority."

(emphasis is ours)

Herein again, the appellant clearly indicated to the respondent, that the rates agreed to between the parties in the contractual obligation would not affect the demand of the appellant to claim for escalation of rates. And further, that the appellant would not bind itself, by signing the contract agreement.

5. After the correspondence, referred to hereinabove, was exchanged between the parties, a formal agreement was entered into between the parties on 16.09.1996. According to the original tender notice, the agreement was for a total consideration of Rs.23,39,845.37 (Rupees twenty three lakhs thirty nine thousand

eight hundred forty five and paise thirty seven only).

6. Since the respondent did not accede to the escalation claim made by the appellant on the basis of the Central Government notification increasing the price of bitumen, the appellant invoked arbitration. The arbitrator in his award dated 31.08.2003, accepted in entirety, the claim raised by the appellant. The objections at the behest of the respondent based on Clauses 16 and 43 of the agreement were sought to be rejected. Clauses 16 and 43 alone have a bearing on the controversy in hand. The same are accordingly reproduced below:

Clause 16 :

"CLAUSE 16. CLAIM ON ACCOUNT OF VARIATION IN PRICES FOR LABOUR AND MATERIALS

*"No claim will be entertained by the Railway for any fluctuation of market rates in respect of Labour and material and the rates accepted and entered into the Agreement shall hold good irrespective of any fluctuation of labour and/as materials costs."*

Clause 43(2) SIGNING OF 'NO CLAIM' CERTIFICATE

*The contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract nor shall the Railway entertain or consider any such claims if made by the contractor, after they shall have signed a 'NO CLAIM' Certificate in favour of the Railway, in such form as shall be required by the Railway after the works are finally measured up. The contractor shall be debarred from disputing the correctness of the items covered by 'NO CLAIM' certificate or demanding a reference to arbitration in respect thereof."*

7. Dissatisfied with the determination rendered in the arbitral award, the respondent assailed the same under Section 34

of the Arbitration and Conciliation Act, 1996 before the High Court of Calcutta. A learned single Judge of the High Court, accepted the challenge raised by the respondent through an order dated 8.4.2005. It is relevant to mention, that the basic premise on which the challenge was accepted was, that the arbitrator did not have jurisdiction in the matter. This inference was drawn on the basis of the fact, that the agreement between the parties was executed on 16.09.1996, whereas, events which occurred prior thereto were irrelevant to the controversy. Seemingly, the assumption was, that the price rise notification dated 3.7.1996 was to the knowledge and notice of the appellant, and as such, when the appellant executed the formal agreement on 16.09.1996, it consented to the position as it prevailed on that date. The entire controversy was examined in the aforesaid background. Clauses 16 and 43 were also viewed in that background.

8. The order passed by the learned Single Judge on 8.4.2005 was assailed unsuccessfully by the appellant before a Division Bench of the High Court. The Division Bench dismissed the challenge through the impugned order dated 19.12.2005. Through the instant civil appeal, the appellant is seeking to assail the findings recorded by the learned Single Judge dated 8.4.2005, and that of the Division Bench of the Calcutta High Court dated 19.12.2005.

9. We have heard learned counsel for the rival parties at some length. The first issue that falls for our consideration is, whether or not the arbitral Tribunal had the jurisdiction in the matter. We are of the considered view, that the assumption of the courts below, that the contractual obligation bound the parties

when the formal agreement was executed on 16.09.1996 was based on an unacceptable foundation. When the offer made by the appellant in response to the tender notice dated 18.01.1996 was accepted by the respondent on 10.05.1996, the obligations between the parties must be understood to have attained finality, inasmuch as, if the appellant chose to walk out of the contractual obligation after its offer was accepted by the respondent, there would be adverse civil consequence, as for instance, the earnest money deposited by the appellant, could have been forfeited. In the above view of the matter, we are of the view, that the obligations between the parties in furtherance of the tender notice dated 18.01.1996 came to be crystalized on 10.05.1996, when the formal acceptance letter was issued by the respondent to the appellant.

10. Having concluded as above, it is obvious that the price rise emerging out of the notification of the Central Government dated 3.7.1996 fell within the jurisdiction of the arbitral Tribunal. We say so, because the above notification was issued after ( and not before) the dates of finalization of the contract between the parties. And as such, the appellant must be deemed to have entered into the contractual obligation, without knowledge and notice of the price escalation. The arbitral Tribunal was therefore obliged to deal with the claim of escalation made by the appellant, premised on the notification dated 3.7.1996.

11. The first question that arises for our consideration is, whether the arbitral award can be considered to be justified in the background of clause 16 of the general conditions of contract. We are of the considered view, that the parties were bound on the

rates executed in the agreement and "any fluctuation of market rates" would not be a ground to entertain a challenge to the determined rates under the contract. First and foremost, we must record that it was well within the domain of the arbitral Tribunal to construe the provisions of the contract. The arbitral Tribunal on analysing clause 16 arrived at the conclusion, that fluctuation of market rates would not be a sufficient ground to entertain a claim for escalation. The arbitral Tribunal however arrived at the conclusion, that the escalation of rates in question was based on a statutory notification issued by the Central Government on 3.7.1996 which did not fall within the realm of clause 16. We are of the view, that the interpretation placed by the arbitral Tribunal on clause 16 was a possible view, and calls for no interference at our hands. Our instant determination is also based on the fact that the appellant had made a stake for escalation in two express communications addressed by the appellant to the respondent dated 22.07.1996 and 13.09.1996, and therefore must never be seen to have accepted the position adopted by the respondent through the letter dated 15.07.1996 (extracted above).

12. The only remaining issue that requires our attention is based on clause 43 of the general conditions of contract. A perusal of the above clause, according to the learned counsel for the respondent, leaves no room for any doubt that after the contractor had signed a "No Claim Certificate" in favour of the respondent, it was not open to the appellant, to raise a claim that he is presently agitating, based on the Central Government notification dated 3.7.1996. It was submitted, that it is not even

the case of the appellant before this Court, nor has it been before the courts below, or even before the arbitral Tribunal that the appellant did not sign the "No Claim Certificate", and that too after the works were finally measured up. It was accordingly submitted, that the factum of having signed a "No Claim Certificate" renders the claim of the appellant unacceptable.

13. It is not necessary for us to seriously examine the issue canvassed at the behest of the respondent, based on clause 43, in view of the following findings recorded by the arbitral Tribunal:

"(5) The respondent argued during hearing meeting that as per clause 43 of General conditions of contract, after signing of No Claim Certificate and acceptance of final bills no further claim is maintainable. During the proceedings this tribunal came to learn from the respondent that signing of 'No Claim Certificate' is compulsory on the part of the claimant in getting the payment for undisputed portion of final bills. Otherwise, the final bills will not be passed; in other words, the claimant had no way but to sign the No Claim Certificate for getting the payment. However, this tribunal considers that payment of final bills after signing the said 'No Claim Certificate' in no way affects the instant claim of the claimant."

(emphasis is ours)

We find no justification to interfere with the afore-stated findings recorded in the arbitral award, especially on account of the fact, that the same was recorded on the basis of inputs furnished at the behest of the respondent itself.

14. In view of the above, we are satisfied, that the impugned orders passed by the learned Single Judge dated 8.4.2005, and by

the Division Bench of the Calcutta High Court dated 19.12.2005, deserve to be set aside. The same are accordingly hereby set aside. In view of the above, we uphold the determination rendered in the award dated 31.08.2003.

15. The respondent shall release the payment in terms of the award dated 31.08.2003 to the appellant, within three months from today. In case the amount is released within the time indicated hereinabove, the appellant shall be entitled to interest at the rate of 12% per annum, failing which the interest shall be paid in terms of the award.

16. The appeal is allowed in the aforesaid terms.

Civil Appeal Nos.4790/2008 and 4791/2008

1. Learned counsel for the parties are agreed that the issue involved in these appeals is identical to the ones raised in Civil Appeal No. 4789 of 2008, which has been allowed by this Court, by passing a detailed order on 03.08.2017.

2. In view of the above, these appeals are also allowed in terms of the order passed by us today in Civil Appeal No. 4789 of 2008 titled (M/s S.R. Ghosh versus Union of India).

.....CJI  
[JAGDISH SINGH KHEHAR]

NEW DELHI;  
AUGUST 03, 2017.

.....J.  
[DR. D.Y. CHANDRACHUD]

ITEM NO.103

COURT NO.1

SECTION XVI

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

Civil Appeal No(s). 4789/2008

M/S. S.R. GHOSH

Appellant(s)

VERSUS

UNION OF INDIA

Respondent(s)

WITH

C.A. No. 4790/2008 (XVI)

C.A. No. 4791/2008 (XVI)

Date : 03-08-2017 These appeals were called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE

HON'BLE DR. JUSTICE D.Y. CHANDRACHUD

For Appellant(s) Mr. Jaideep Gupta, Sr. Adv.  
Mr. Rana Mukherjee, Sr. Adv.  
Mr. Samar Basu, Adv.  
Mrs. Priya Puri, AOR  
Mr. Vaibhav Srivastav, Adv.  
Mrs. D.B. Mukherjee, Adv.

For Respondent(s) Mr. Ajit Kumar Sinha, Sr. Adv.  
Mr. Amit Sharma, Adv.  
Ms. Kiran Bhardwaj, Adv.  
for Mr. Raj Bahadur, AOR

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

The appeals are allowed, in terms of the signed order.

(PARVEEN KUMAR)  
AR CUM PS

(RENUKA SADANA)  
ASST.REGISTRAR

[signed order is placed on the file]