

State of Haryana Vs. M/s. Shiv Shankar Construction Co. & Anr.

Civil Appeal Nos. 7379-7380 of 2021
2021-01-01 | M. R. Shah, J.
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Full judgment text

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[Civil Appeal Nos. 7379-7380 of 2021]

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 03.11.2015 passed by the High Court of Punjab and Haryana at Chandigarh in FAO No. 4482 of 2011 (O&M), by which the High Court has dismissed the appeal preferred by the appellant herein under Section 37 of the Arbitration and Conciliation Act, 1996, the State of Haryana has preferred the present appeals.

2. At the outset it is required to be noted that while issuing notice in the present appeals, this Court has stayed the award exceeding Rs.1,03,50,263/insofar as claim Nos.1 and 8 are concerned.

3. The facts leading to the present appeals in a nutshell are as under:

3.1 That the appellant herein awarded the contract to respondent No.1 herein - contractor for strengthening, upgradation and maintenance of road from Palwal to Hasanpur, Haryana for a length of 31.17 kilometres on certain terms and conditions as per the contract entered into between the parties. The contract was for Rs.5,26,59,688/-. That as per the design calculation data, the specifications as prepared by the appellant department were meant for 3364 traffic intensity PCU (Passenger Car Unit)/day. The contract was up to 31.05.2010. That on 05.03.2005 due to the closing of the Palwal Aligarh Road on account of the construction of the railway bridge, the entire traffic was diverted from Palwal Aligarh Road to the present road.

That due to this diversion of traffic from Palwal Aligarh Road, heavy traffic of 24418 PCUS per day was plying on the road as against the design of 3364 PCUS per day, which damaged the road. That according to the contractor - respondent No.1 herein, he was required to do heavy repair by incurring additional expenditure. Disputes arose between the parties.

A legal notice was served upon the appellant making the claims. Disputes were not resolved and therefore respondent No.1 - contractor invoked the arbitration clause as per clauses 24 & 25 and approached the High Court for appointment of an arbitrator in exercise of power conferred under Section 11 (6) of the Arbitration and Conciliation Act, 1996. 3.2 Vide order dated 23.04.2007, the High Court appointed Shri R.S. Jindal, retired Chief Engineer, Delhi Development Authority as the sole Arbitrator to adjudicate upon all the disputes between the parties. That the contractor submitted various claims including claim Nos. 1 and 8. For the purpose of deciding the present appeals, claim Nos.1 and 8 are relevant. The sole Arbitrator awarded a total sum of Rs.1,51,95,400/with respect to claim Nos.1 and 8.

4. Feeling aggrieved and dissatisfied with the award declared by the learned Arbitrator, the appellant preferred an application before the Court under Section 34 of the Arbitration and Conciliation Act, 1996, which came to be dismissed against which the appellant - State preferred an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 before the High Court. By the impugned judgment and order the High Court has dismissed the said appeal. Hence, the State of Haryana has preferred the present appeals.

5. Shri Shyam Divan, learned Senior Advocate has appeared on behalf of the State - appellant and Shri Ranjit Kumar, learned Senior Advocate has appeared on behalf of the respondent No.1 - contractor.

5.1 Shri Shyam Divan, learned Senior Advocate appearing on behalf of the appellant submitted that the appellant has already paid to respondent No.1 - contractor an amount of Rs.1,03,50,263/pursuant to the interim order dated 26.08.2016 passed by this Court.

5.2 Shri Shyam Divan, learned Senior Advocate appearing on behalf of the appellant has submitted that the arbitral award is liable to be set aside on the following grounds:

(i) The award is in excess of claim;

(ii) The Arbitrator exceeded the scope of reference;

(iii) The Arbitrator has rewritten the contract with respect to the amount payable which was specified in the contract.

5.3 Now, so far as ground No.1 that the award is in excess of claim, it is vehemently submitted by Shri Shyam Divan, learned Senior Advocate appearing on behalf of the appellant that the contractor in its statement of claim had claimed an amount of Rs. 1,03,50,263/only under the claim Nos.1 and 8. It is submitted that despite the above the Arbitrator has awarded a total sum of Rs.1,51,95,400/, which is in far excess of amount claimed. It is submitted that the statement of claim was never modified by the contractor and therefore, the Arbitrator ought not to have awarded the sum/amount in excess of the amount claimed.

5.3.1 It is submitted that the differential amount of Rs.48,45,137/is in excess of claim and to that extent the arbitral award is invalid and liable to be set aside. Reliance is placed on the decision of this Court in the case of ONGC Ltd. v. OffShore Enterprises Inc., (2011) 14 SCC 147 (para 16). 5.3.2 It is submitted that as held by this Court in the cases of Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49 (para 36) and J.C. Budhraj v. Chairman, Orissa Mining Corpn. Ltd. & Anr., (2008) 2 SCC 444 (para 3132), making an award in excess of claim is clear cut an act exceeding the jurisdiction and amounts to a misconduct of the Arbitrator.

5.4 Now, so far as ground No.2 namely, that the Arbitrator exceeded the scope of reference, it is contended that the Arbitrator cannot exceed the scope of reference.

5.4.1 It is submitted that the contractor invoked the arbitration clause on 06.03.2006. The High Court appointed the sole Arbitrator on 23.04.2007 and the Arbitrator entered upon reference on 19.05.2007. It is urged that by allowing the claims for a period beyond 19.05.2007, the Arbitrator exceeded the scope of reference.

5.4.2 It is submitted that an amount of Rs.57,96,000/(approx.) has been awarded for claims arising between 19.05.2007 to 31.07.2008 (calculated as amount for maintenance of road @ Rs. 45,000/per kilometre (km) per month). It is submitted that it was not permissible for the Arbitrator to exceed the scope of the reference beyond the date upon entering reference and as a consequence the award is liable to be set aside.

5.4.3 Learned senior counsel appearing on behalf of the appellant has relied upon the decisions of this Court in the cases of Indian Aluminium Cables Ltd. v. Haryana State Electricity Board, 1996 (5) SCALE 708 (para 2) and MSK Projects India (JV) Ltd. v. State of Rajasthan & Anr. (2011) 10 SCC 573 (para 15), in support of his above submissions that as the Arbitrator exceeded the scope of reference and hence the award is liable to be set aside.

5.5 In so far as the ground No.3 is concerned namely, the Arbitrator has rewritten the contract with respect to the amount payable which was specified in the contract, it is submitted that the Arbitrator has rewritten the terms of the contract by directing the appellant to pay the compensation to respondent No.1 - contractor at the rate of Rs.45,000/per km per month instead of mutually agreed contractual rate of Rs.1,000/per km per month. It is contended that it was not open to the Arbitrator to rewrite the terms of the contract and award the contractor a higher rate for the work than the rate which was already fixed in the contract. It is submitted that such an exercise is beyond the competence and authority of the Arbitrator. Reliance is placed on the decision of this Court in the case of Satyanarayana Construction Company v. Union of India and Others (2011) 15 SCC 101 (para 11).

5.6 It is further contended by Shri Divan, learned Senior Advocate appearing on behalf of the appellant that even otherwise, the amount awarded by the Arbitrator at Rs.45,000/per km per month beyond the time period of additional traffic i.e. from 31.07.2008 to 31.05.2010 i.e. till the end of contract is wholly impermissible. It is submitted that diversion of traffic on 9.2 km stretch of the road which gave rise to the cause of action ceased to exist w.e.f. January 2008. It is submitted that however, the Arbitrator has directed the appellant to make payment at Rs. 45,000/per km per month even beyond the time period of additional traffic. It is contended that the aforesaid is wholly impermissible.

6. Making the above submissions, it is prayed to allow the present appeals.

7. Shri Ranjit Kumar, learned Senior Advocate appearing on behalf of respondent No.1 - contractor, has vehemently contended that the award passed by the Arbitrator cannot be said to be (i) in excess of claim; (ii) exceeding the scope of reference and (iii) rewriting the contract with respect to the amount payable which was specified in the contract, as submitted on behalf of the appellant. It is submitted that in the statement of claim the contractor specifically stated that the amount has been worked out up to the month of May, 2007 and the details of expenditure beyond May, 2007 will be submitted during the course of hearing. It is therefore submitted that it cannot be said that claim Nos.1 and 8 were restricted to Rs. 1,03,50,263/only. It is urged that on appreciation of the evidence on record the Arbitrator has awarded Rs. 1,51,95,400/for claim Nos.1 and 8, which in any case cannot be said to be beyond the amount claimed in the statement of claim.

7.1 It is next contended that it also cannot be said that the award passed by the Arbitrator was beyond the scope of reference. It is submitted that as such cause of action to claim the additional amount arose due to overexpenditure owing to maintenance of road due to diversion of traffic from Palwal Aligarh Road to the present road which continued even beyond 06.03.2006 and/or 23.04.2007 and 19.05.2007. It is submitted that the amount awarded by the Arbitrator under claim Nos.1 and 8 cannot be said to be exceeding the scope of reference.

7.2 It is further submitted that even the award passed by the Arbitrator to make payment at Rs.45,000/per km per month cannot be said to be rewriting of the contract with respect to the amount payable which was specified in the contract. It is urged that at the time when the contract was written/entered into between the parties the contract rate of Rs.1,000/per km per month was agreed against the design of 3364 PCUS per day.

However, after the contract was entered into and the contractor acted as per the contract there was diversion of traffic from Palwal Aligarh Road to the present road and the heavy traffic of 24418 PCUS per day was plying on the road as against the design of 3364 PCUS per day and therefore the contractor was required to incur additional expenditure at Rs.45,000/per km per month. It is submitted that the amount awarded by the Arbitrator at Rs.45,000/per km per month cannot be said to be rewriting the contract with respect to the amount payable than what was specified in the contract i.e. Rs.1,000/per km per month.

7.3 However, Shri Ranjit Kumar, learned Senior Advocate appearing on behalf of the contractor is not in a position to justify the award by which the Arbitrator has awarded the payment at Rs.45,000/per km per month even beyond the time period of additional traffic i.e. up to 31.05.2010 i.e. till the end of the contract.

8. We have heard the learned senior counsel appearing on behalf of the respective parties at length and given our thoughtful consideration.

9. That the contractor was awarded the contract for maintenance, etc. The contract amount was for Rs.5,26,59,688/. The rate of maintenance of the road as accepted was Rs.12,000/per km per annum or Rs.1,000/per km per month. The maintenance contract was valid up to 31.07.2010. When the contract was entered into, the contract was meant for only 3364 PCUS per day.

However, due to diversion of traffic from Palwal Aligarh Road to the present road, the contractor was required to incur additional expenditure on the maintenance due to increase in the traffic and plying the additional commercial vehicles. Therefore the contractor claimed the amount towards additional expenditure for maintenance which was due to increase in the traffic and plying more commercial vehicles. On appreciation of evidence the Arbitrator has determined the loss at Rs.45,000/per km per month (claim Nos.1 and 8).

9.1 The case on behalf of the appellant that as in the statement of claim, the claimant claimed an amount of Rs.1,03,50,263/under the claim Nos. 1 and 8 and the Arbitrator has awarded Rs.1,51,95,400/, the same is in far excess of amount claimed and therefore the award is in excess of amount claimed has no substance. When the statement of claim submitted by the contractor is seen, it is specifically stated by the claimant that the amount of Rs.1,03,50,263/has been worked out up to May, 2007 and the details of expenditure beyond May, 2007 will be submitted during the course of hearing. It is specifically stated that expenditure incurred up to May, 2007 works out to Rs.1,03,50,263/. Therefore, the amount awarded by the Arbitrator cannot be said to be in excess of the claim.

9.2 Now so far as the submission on behalf of the appellant that the Arbitrator exceeded the scope of reference while awarding an amount beyond 19.05.2007 - the date on which the High Court appointed the sole Arbitrator is concerned, the same has no substance. The case on behalf of the appellant that the Arbitrator ought to have restricted the claim either up to 06.03.2006 - the date on which the contractor invoked the arbitration clause or 23.04.2007, the date on which the High Court appointed the sole Arbitrator or at least up to 19.05.2007 - the date on which the Arbitrator entered into reference, is concerned, it is required to be noted that the claim made by the Arbitrator was till the traffic was diverted which was up to January, 2008. Therefore, the Arbitrator was justified in awarding the amount beyond the aforesaid periods and till the additional traffic was diverted due to the closure of Palwal Aligarh Road.

9.3 Now the submission on behalf of the appellant is that by awarding Rs.45,000/per km per month the Arbitrator has rewritten the contract with respect to the amount payable than what was specified in the contract. It is urged that under the contract mutually agreed contractual rate was Rs.1,000/per km per month and therefore any amount higher than Rs.1,000/per km per month is beyond the terms and conditions of the contract, is also without substance. It is noted that at the time when the contract was entered into the mutually agreed, the rate fixed was Rs.1,000/per km per month and the estimated traffic was 3364 PCUS per day.

The cause of action arose subsequently due to diversion of traffic from Palwal Aligarh Road and plying of more heavy vehicles due to which the contractor was required to incur additional expenditure for maintenance of the road. Therefore, the contractor was entitled to the loss on account of the additional expenditure incurred for maintenance of the road due to increase in the traffic because of the closure of the Palwal Aligarh Road and diversion of the traffic to the present road. Therefore, by no stretch of imagination it can be said that there was rewriting the terms of the contract as submitted on behalf of the appellant.

9.4 In view of the above findings, none of the decisions of this Court relied upon by the learned senior counsel appearing on behalf of the appellant are applicable to the facts of the case on hand as the same are not of any assistance to the appellant.

9.5 However, at the same time Shri Divan, learned Senior Advocate, appearing on behalf of the appellant is justified in submitting that the Arbitrator ought not to have awarded an amount of Rs.45,000/per km per month beyond the time period of additional traffic. The Arbitrator has awarded the loss/amount at Rs.45,000/per km per month up to 31.05.2010 i.e. till the end of the contract which is wholly impermissible diversion of the additional traffic ceased to exist w.e.f. January, 2008. Therefore, the Arbitrator ought not to have awarded any amount beyond the above time period beyond January, 2008. To that extent the award passed by the Arbitrator can be said to be perverse and to that extent the present appeals are required to be allowed.

10. In view of the above and for the reasons stated above, the present appeals are allowed in part. The award passed by the Arbitrator awarding the amount/compensation at Rs.45,000/per km per month up to January, 2008 under claim Nos.1 and 8 is hereby confirmed. The award passed by the Arbitrator awarding the amount/compensation at Rs.45,000/per km per month from February, 2008 to 31.05.2010 i.e. till the end of the contract is hereby quashed and set aside. The amount due and payable has to be worked out accordingly. The present appeals are partly allowed to the aforesaid extent. In the facts and circumstances of the case there shall be no order as to costs.

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