(1997) 09 MP CK 0035

Madhya Pradesh High Court

Case No: C.R. No. 584 of 1990

State of M.P.		APPELLANT
	Vs	
Technodrillers		RESPONDENT

Date of Decision: Sept. 12, 1997

Acts Referred:

- Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 - Section 7

Citation: (1998) 1 MPLJ 602

Hon'ble Judges: A.K. Mathur, C.J; Dipak Misra, J

Bench: Division Bench

Advocate: P.D. Gupta, for the Appellant; V.R. Rao, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Dipak Misra, J.

In this Civil Revision preferred u/s 19 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as Adhiniyam''), the State of M. P. through its officers call in question the justifiability of the award passed by M. P. Arbitration Tribunal, Bhopal in reference case No. 49/89 awarding Rs. 2,91,722.50/- along with interest at the rate of 12% per annum w.e.f. 13-6-1989 in favour of the respondent.

The facts as have been adumbrated in the award are that the respondent, a registered firm entered into an agreement with State of M. P. for construction of Deo River Acquaduct at C.H. 2658 of Main Canal, Dhuty L.B.C. The petitioners'' tender rates which were accepted 32.09% above CSR by the owner, worked out to Rs. 22,92,781/-. The time allowed for completion of work was 18 months excluding rainy season from 1st, July to 30th, September. The work order was issued by the owner on 19-12-1988. The Chief Engineer during his inspection of the work on

6-4-1987 directed certain changes in the designs and drawings of the foundation of the two central piers from ''well sinking'' to ''open foundation''. By that time the claimant had already made all requisite arrangements for ''well sinking'' by spending a sum of Rs. 2.0 lacs. Because of this change in the design, huge dewatering was involved. The item of dewatering for ''open foundation'' of central piers was treated by the Department as an Extra item of work. But under the instructions of the Chief Engineer a recovery of Rs. 1.43 lacs was to be made as the said amount was paid towards dewatering to the contractor/respondent. It was putforth before the Tribunal that as per the agreement metal was to be collected from specified Dahedi Quarry with a lead of only 5 kms. The metal was available in the said quarry. On request being made for grant of permission to bring the metal from another quarry i.e. Kayadi involving extra lead, the same was given to the claimant. However, the rate of extra lead of metal was not decided by the Department. It was also stated in the claim petition that extra work of filling foundations around the masonry including watering and ramming was not included in the Schedule (G) of the agreement. However, the Department considered the said work to be necessary and got the same executed through the claimants. The extra rates for the said item of work were recommended by the departmental authorities to the Chief Engineer but no decision was taken at the level of the Chief Engineer. After expiry of the stipulated date, extensions prayed for the respondent were granted to him upto 18-3-1989 and thereafter, he was allowed to continue the word without formal extension. It was setforth by the claimant-contractor that departmental authorities had recommended his claim for expenses incurred by him because of change of design, dewatering for ''open foundation'' work of central piers treating the same as an extra item of work; extra rates for extra lead of metal and extra rates for work of filling foundation. The aforesaid claims were duly referred to the Superintending Engineer on 13-4-1989 for his decision. Besides the aforesaid claim compensation was claimed due to belated change in designs and drawings, non-supply of detailed working drawing and other necessary designs. Asseverating these facts the claimant putforth a claim for a sum of Rs. 5,06,216/- along with pendente lite and future interest at the rate of 18% per annum u/s 7 of the Adhiniyam.

The present respondents before the Tribunal, entered contest stating, inter alia, that the claims were premature because they were pending for decision before the competent authority and further, the petitioner had not complied with the requirements of the agreement by submitting all the claims after quantifying them before the Superintending Engineer in the first instance. It was further pleaded by them that Rs. 1,43,618/- was inadvertently paid to the claimant and Rs. 19,958/- had already been recovered by the Department and balance was required to be recovered. It was further stated that the claimant stopped the work and did not recommence in spite of repeated requests. Breach of agreement was seriously disputed. Traversing in this manner the claim of the claimant was combated. The

Tribunal on consideration of the documents produced before it and on scrutiny of the oral evidence came to hold that the contention of the owner that the claims were premature was untenable; due to material change in the designs and drawings of the foundation the amount spent by the Claimant for ''well sinking'' was of no use to the claimant and, therefore, he was entitled to Rs. 1,54,515/-; and Rs. 1,73,094/- for extra work of dewatering and Rs. 30,000/-against the actual lump sum payment out of Rs. 60,000/- stipulated in the agreement and the owner was not entitled to recover Rs. 1,43,618/- on the ground of excess payment but was only entitled to recover Rs. 524/- and the claimant was entitled to get a refund of Rs. 19,950/- which had already been recovered; the claimant was entitled to recover Rs. 1,17,773.50/- in respect of extra item of earth work; and the claimant was not entitled to interest of Rs. 70,556/- as claimed by him.

Challenging the aforesaid award, Mr. P. D. Gupta, learned Government Advocate has contended that as all the claims were under consideration of the competent authorities of the department the claim petition was premature and the Tribunal has grossly erred in overruling the said preliminary objection. It is his further submission that the Tribunal has erred in law in adjudicating the lis without properly appreciating what has been contemplated in Clause 4.3.29.1 of the agreement. He has also seriously criticised the award on specific items on the ground that they exhibit protervity to the core.

Mr. V. R. Rao, learned counsel for the respondent has canvassed that the finding of the Tribunal in regard to ripeness of the disputes for adjudication by the Tribunal cannot be found fault with as the same has been arrived at on cogent and detailed scrutiny of the terms of the agreement and the conduct of the parties. He has also putforth with emphasis that the delineation of the itemwise claim by the Tribunal does not demonstrate perversity nor does it reflect any kind of legal misconduct or exhibit any material irregularity warranting any interference by this Court in exercise of its revisional jurisdiction.

We shall first advert to the contention whether the claim petition considered in the prevalent factual matrix, was premature or was it against the mandate of Clause 4.3.29.1 of the agreement. On a perusal of the award we find that number of correspondences along with drawings and revised drawings were brought before the Tribunal and marked as exhibits. It is apparent from the correspondences that the case of the petitioner was recommended by the subordinate authorities but he could not be paid for lack of determination. The repeated written requests and reminders given by the claimant-contractor fell on deaf ears and the authority chose to maintain sphinx-like silence. Lack of response from the higher authorities compelled the claimant to discontinue the work and his attempt to get just reaction from the competent authorities became an exercise in otiosity. The Tribunal on referring to the decisions rendered in the cases of Jhabbumal Jangbahadur v. Nanakchand Agrawal AIR 1982 Delhi 55 and Gulam Khadir v. State AIR 1972 J&K 44,

came to hold that the claim petition filed by the claimant was not premature as difference had already arisen between the parties.

From the factual scenario as has been depicted before the Tribunal, it is clear as day that the contractor had amply demonstrated through documentary evidence that outstanding payments of substantial nature had been withheld for a considerable length of time and he had made positive demands for payment of such bills which were lawfully due to him. That apart there was a direction by the concerned Chief Engineer to recover certain amount on the ground of unjustified excess payment. Submission of Mr. Gupta is that as the claim putforth by the claimant was still pending for consideration before the departmental authority he could not have approached the Tribunal for adjudication as existence of dispute is a condition precedent to invoke the jurisdiction of the Tribunal. True it is, existence of a ''difference'' or a ''dispute'' is a sine qua non to take recourse to arbitration. A difference or dispute does not arise in a vacuum. When the petitioner has sent series of correspondences asserting his dues to be paid to him but sphinx-like silence was maintained and no action was taken, it can be inferred that the difference had already arisen. The silence, which is not a golden one, was in fact, a repudiation of the claim asserted by the claimant. A claimant is not expected to wait till the authorities wake up from their slumber and react nor is it expected from him to cultivate job''s patience. The conduct of the departmental authorities speaks eloquently of their denial of the claim advanced by the claimant-contractor. Once there is assertion and denial, either expressed or implied, there comes into existence a dispute.
At this juncture we may refer to the observations made by Lord Halsbury, L.C. in the case of London and North Western and Great Western Joint Railways Companies v. J. H. Billington Limited 1899 A.C. 79 (HL), which reads as follows :-

"A condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched."

Arising of a dispute can be either expressed or implied. In this context we may refer to the decision rendered in the case of Nandram Hanutram Vs. Raghunath and sons Ltd., , wherein, Bachawat, J. spoke thus :

"The existence or disputes or differences contemplated by an arbitration clause is an essential condition of and prerequisite to the exercise of the jurisdiction by the Arbitrator. A dispute implies an assertion or a right by one party and a repudiation thereof by another. The repudiation by the other party may be either express or implied and may be by words or by conduct. Failure to perform the contract and to pay the amount claimed may take place under such circumstances as may justly lead to the inference of repudiation and denial of the right of the other party. Coupled with other circumstances a failure to pay a claim may constitute a

difference between the parties. Failure to pay under a claim of right is certainly a dispute."

From the aforesaid it becomes abundantly clear that if the owner maintains a studied silence, the said silence would be more pregnant than expressed words. We may, at this juncture, profitably refer to the decision rendered in the case of P.C. Rajput Vs. State Govt. of Madhya Pradesh and Others, , wherein, a Division Bench of this Court while considering assertion of a claim and the denial of the same by the other side opined that the word difference arising out of, must receive the meaning as understood in Arbitration Jurisprudence u/s 2(2) of the Arbitration Act, 1940. Their Lordships referred to Clause 51 of the said agreement which required the claimant to file his grievance stating the particular breach and nature of dispute arising out of the contract and approach the Engineer In-charge in writing and the said authority was required to give a decision within 30 days. The claimant was conferred the privileges of preferring an appeal to the Superintending Engineer who was to hear the matter within 60 days. It was also provided therein if the contractor was dissatisfied with a decision he was required to make a request within 30 days from the date of receipt of the decision indicating his intention to refer to the disputes to arbitration, failing which the said decision was deemed to be final and conclusive. While scrutinising the said Clause their Lordships held as follows :-

"Question of questions is completely shuts out the approach to the arbitration tribunal pausing here for a moment in order to find out whether a dispute has arisen it is necessary to see that any claim has been made and there is a denial or refusal by the other side. This is the basis theory of the arbitration which has been accepted all along. How the situation arising because of the statutory provision conferring jurisdiction to the Arbitration Tribunal u/s 7 of the Act in respect of the works contract of the value of more than Rs. 50,000/- does it mean that a contractor can come straightaway to the Arbitration Tribunal without making any demand or decision of the claim made by him. There may be matters which may be settled under Clause 51 and the contractor may well accept the same and there may not arise any occasion for referring the matter to the Arbitration, yet, there may another situation whenever after making a demand raising a dispute the officers stated in the said clause may not take any steps and sit over the matter whether in such a situation can it be said that a dispute has arisen may be that a long delay in taking a decision by the executing party may itself turn it into a dispute for the purpose of reference to the Arbitration Tribunal."

Their Lordships further proceeded to state:

"As pointed by us, there may be different circumstances and even if a dispute has been raised, there may not be denial or refusal. In such circumstances, the view of the Tribunal cannot be accepted that it cannot entertain the dispute at all. If the Tribunal entertains a dispute then it cannot shut out the claimant on the ground that it has not approached the authorities and, therefore, the claim is not

entertainable. The Tribunal may well consider whether to entertain the reference petition in respect of such cases and decide at the threshold the question and direct the claimant to approach the authorities under the agreement but cannot throw the claim altogether. True it is that the dispute arises only when there is assertion and denial as understood under the arbitration proceedings. Absence of denial when there has been an approach should be presumed to raise a dispute entertainable by the Tribunal."

Quite apart from the above in the instant case there was positive demonstration of difference/dispute as the Chief Engineer had directed for recovery in certain spheres. Judged by the aforesaid parameters, we are of the considered view, a dispute did arise between the parties and the Tribunal is absolutely justified in holding that the claim petition is not premature. We accept the said conclusion to be correct and reject the contention canvassed by the learned Government Advocate.

The next contention is that dispute could not be adjudicated by the Tribunal in view of Clause 4.3.29.1 of the agreement. The said Clause reads as follows :-

"4.3.29.1 Except where otherwise specified in the contract for contracts upto Rs. 50 lakhs, the decision of the Superintending Engineer of the circle for the time being in respect of all questions and disputes relating to the meaning of the specification, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right matter of 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 shall be final, provided that the Superintending Engineer before giving decision in the matter gives an opportunity of being heard to the parties to the contract.

If any party to the contract 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 Engineer requiring that the matter may be referred to arbitration and furnishing detailed particulars of the dispute or difference and specifying clearly the point at issue. If any party 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, final and binding on all the parties.

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 conclusive, final and binding on all the parties.

If the work under the contract has not been completed when a dispute is referred to arbitration, work shall continue during the 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."

On a plain reading of the aforesaid clause in the agreement it becomes clearly perceptible that in respect of certain aspects the decision of the Superintending Engineer is final subject to notice within 28 days in writing requesting him to refer the matter to arbitration detailing particulars of the dispute or difference specifying clearly the point in issue. In the case at hand, as is apparent from the materials on record that there was recommendation by the Executive Engineer and the Superintending Engineer but the same was not accepted by the Chief Engineer. The amount of the petitioner was withheld. As it appears that the Superintending Engineer possibly being helpless did not take a decision. Tribunal has noticed that repeated requests by the claimant to the Superintending Engineer were not paid heed to as he was helpless because the concerned Chief Engineer did not pass any order approving the rates of extra items in spite of having made various queries in the matter and had directed for recovery. The Tribunal has referred to the notice (Ex. P-32) dated 13-4-1989 wherein, under compelling circumstances the claimant-contractor had to request the Superintending Engineer to make a reference to Arbitration Tribunal in view of non-settlement of his claims for considerable length of time. In view of the obtaining circumstances he had, in clear-cut terms, specified the particularities of the disputes and differences in the notice. If the Superintending Engineer did not take a decision in respect of the claims putforth by the claimant for a considerable length of time and the claimant issued a notice by abundant caution, a plea cannot be made available to the owner that as the matter remained pending with the Superintending Engineer, the Arbitration Tribunal was devoid of jurisdiction to adjudicate the controversy. Such a contention, we are afraid, would frustrate the very purpose of arbitration and entertainment of such a plea would also frustrate the purpose and object for which the Adhiniyam was enacted.

Now we shall proceed to deal with the contention of Mr. Gupta that there is apparent error and material irregularity in the delineation of the individual items of claim. We notice that the Tribunal has awarded Rs. 1,54,515/- towards expenditure due to change of designs. The authorities have admitted before the Tribunal that there was a change of design. The changes in design were confirmed by letter dated 10-4-1987 (Ex.P-19). The claimant has submitted bills of direct and indirect expenses incurred by him for ''well sinking'' vide his letter dated 23-9-1988 under (Ex.P-20) and the Executive Engineer had recommended for payment of Rs. 1,68,515/- to the Superintending Engineer. The said letter has been brought on record under (Ex.P-8). The Superintending Engineer in his term recommended payment of Rs. 1,54,515/- by his letter dated 13-1-1989 (Ex.P-12) to the Chief Engineer. It is also discussed by the Tribunal, that the owner-respondent in the written statement did not dispute the claim but only stated that the amount could not be paid as sanction was awaited from the competent authority. This being the factual position, there is no question

of any kind of material irregularity in the finding recorded by the Tribunal inasmuch as a finding has been determined on the basis of admission.

As far as claim item No. 2 is concerned the same relates to dewatering charge as per original agreement and excess payment due as there has been change in design. On a perusal of the reasonings given by the Tribunal we find that the Tribunal has taken note of the fact that the Department had maintained Log books of pumps and worked out the amount payable as recommended by the Executive Engineer and accepted by the Superintending Engineer. The Tribunal after referring to the letters of the Executive Engineer and of the Superintending Engineer, Ex.P-9 and 12 respectively and on consideration of the other materials recorded a finding that the recommendation of the Executive Engineer was on the basis of the conservative assessment and accordingly held that the petitioner was entitled to Rs. 30,000/- towards lump sum payment only out of the lump sum payment of Rs. 60,000/- under the same item. The Tribunal also held that the Superintending Engineer by his letter dated 13-1-1989 (Ex. P-12) had recommended for payment of Rs. 1,73,094/- towards extra items of dewatering of ''open foundation'' of piers on the basis of Log-books maintained by the Department. We notice that the Tribunal has accepted the recommendation after discussing other materials on record and has opined that the owner was not entitled to recover the payment of Rs. 1,43,618/- but was entitled to recover Rs. 524/- only. We find that the tribunal has directed refund of Rs. 19,958/- which had already been recovered by the owner. The finding of the Tribunal is based on materials on record and supported by cogent and adequate reasons and same does not call for any interference by this Court.

As far as claim item No. 3 is concerned the same relates to earth work around masonry works/back filling for earth obtained from spoil. On a perusal of the award we find that the Tribunal has taken into consideration the pleadings in the written statement wherein the present revisionists had admitted that the said work was an extra item and payment was not made as sanction was awaited from the competent authorities. We also notice that the Executive Engineer vide his letter dated 25-3-1989 (Ex.P-6) had recommended. The Superintending Engineer had recommended for payment of extra item of work vide his letter dated 31-3-1989. The Chief Engineer by his letter dated 24-4-1989 (Ex.P-18) suggested to the Superintending Engineer that the rates are to be decided as per Clause 4.3.13.3(d) of the Agreement. Thereafter, as has been stated by the Tribunal, the Executive Engineer worked out the amount on two alternatives but the Tribunal on interpreting the relevant clause has come to hold that the claimant was entitled to Rs. 1,17,773.50/-. The said conclusion does not indicate any kind of material irregularity. But, on the contrary, we find his claim was admitted by the State authorities before the Tribunal. The quantum having been properly fixed on interpretation of the relevant clause, we do not think the same calls for reversal by this Court.

In view of our preceding analysis, there is no merit in the revision and the same is accordingly dismissed. However, there will be no order as to costs.