(2013) 2 CHN 641

Calcutta High Court

Case No: A.P.O. No. 18 of 1991

Board of Trustees for the Port of Calcutta		APPELLANT
	Vs	
Royal Constructions		RESPONDENT

Date of Decision: Sept. 25, 2012

Acts Referred:
Arbitration Act, 1940 â€" Section 30, 33#Contract Act, 1872 â€" Section 70

Citation: (2013) 2 CHN 641

Hon'ble Judges: Kalyan Jyoti Sengupta, J; Asim Kumar Mondal, J

Bench: Division Bench

Advocate: S. Roychowdhury, for the Appellant; A. Mukherjee, for the Respondent

Final Decision: Dismissed

Judgement

Kalyan Jyoti Sengupta, J.
The appeal has been preferred by the above named appellants being aggrieved by and dissatisfied with the

judgment and order of the learned Trial Judge dated 22nd November, 1990 whereby and whereunder the award of the learned sole Arbitrator has

been made rule of the Court, and decree has been passed. The short fact of the case leading to bringing action by the appellant is summarized as

follows:-

The respondent above named was awarded contract for 60% of the total works of annual maintenance of road at residential area of the Haldia

Dock Complex by the appellant. The appellant was successful tenderer for the entire tender works agreeing to execute the works at a sum of Rs.

8,83,362.12. But the same could not be completed within the time stipulated for various reasons. Accordingly extension of time was granted for

completion of the same. The payment was made for the works done and the respondent is said to have signed the final bill of payment and ""no

claim certificate"" was issued by the respondent. Thereafter the respondent demanded of the appellant for making payment of a sum of Rs.

3,91,052.35 on various heads. Obviously such payment was not made by the appellant, and hence dispute arose. In terms of the agreement the

dispute was referred to Sole Arbitration of one Mr. D.P. Roy Chowdhury. The statement of claim was filed by the respondent naturally counter

statement was also filed by the appellant to contest the claim made by the respondent before the learned Arbitrator.

2. In the statement of claim aforesaid aggregate amount of Rs. 3,25,768.37p on account of principal under various heads, and interest at the rate

of 18.5% calculated from 1st June to 30th June, 1986 amounting to Rs. 65,283.98 p. thus aggregating to Rs. 3,91,052.35p. was made. Break up

of the head of the claim are as follows:-

3. The defence taken that most of the claims are not admissible under the Special Condition of Contract or General Conditions of Contract. It was

contended that the claim No. 1 was not permissible under Clause 7 of the Special Condition of Contract; Claim No. 2 is also prohibited under

Clause 65 of General Condition of Contract; Claim No. 3 is not allowable under Clause 10 of the Special Condition of Contract; Claim No. 4 is

also disallowable under Clauses 24, 25(a) and 26(a) of the General Condition of Contract; Claim No. 5 is prohibited by Clause 26(a) of General

Condition of Contract; Claim No. 6 is not allowable under Clause 48(b) of General Condition of Contract; Claim No. 7 cannot be allowed under

Clause 7 of the Special Condition of Contract; Claim No. 8 is hit by Clause 33 of the General Condition of Contract; Claim No. 9 is also the same

position under Clause 65 as Claim No. 8 is; Claim No. 10 is also barred by Clause 65 of General Condition of Contract; Claim No. 11 being the

amount of interest is prohibited under Clause 13(g) as quoted above.

4. After several sittings the learned Sole Arbitrator has awarded a lumpsum amount of Rs. 2,5300/- without spelling out his mind, out of total claim

as above. In addition thereto cost of the arbitration of a sum of Rs. 26,720/- has been allowed no pendente lite interest has been allowed in the

awarded sum.

5. The appellant thus filed an application under sections 30 and 33 of the Arbitration Act, 1940 (since repealed) for setting aside the same

principally on the ground of legal misconduct committed by the learned Arbitrator having awarded the lump sum amount and most of which are

covered by prohibitory clause of the agreement. The learned Trial Judge however did not accept the challenge and upheld the award substantially

and decree was passed accordingly.

6. Before us Mr. Shurit Roy Chowdhury, Barrister-at-Law contends that on plain reading of the claims under different heads it would appear that

same are absolutely barred under various terms and conditions of the General Condition of Contract or Special Condition of Contract. Therefore,

the learned Arbitrator having passed lumpsum award without assigning reason has committed misconduct as the amount of the award if properly

read and considered would cover all the claims, which are not permissible under the terms of the contract. He has drawn our attention to Clauses 7

and 10 to contend that by virtue thereof the Claim No. 1 amounting to Rs. 96,557.15p and a sum of Rs. 12000/- on account of reimbursement of

losses on account of idle labour due to department''s failure to place road roller, and sum of Rs. 18,120/- under the head Claim No. 7 for extra

expense incurred due to increase of labour rate are not at all awardable, as such claims were contrary to the aforesaid clauses. Similarly he has

cited the Clause 65 of General Condition of Contract to resist the Claim No. 2 on account of reimbursement of loss on account of idle labour

during the Port and Dock strike. He wants us to read Clauses 24, 25(a) and 26(a) of General Condition of Contract that the same do not permit

to support claim of Rs. 30,658.51p on account of reimbursement of additional cost of execution in respect of extra quantities of work order after

expiry of original date of completion. Similarly he contends that Claim No. 5 is absolutely hit by Clause 26(a) of General Condition of Contract so

also the interest on the wrongfully withheld amount of second running account bill and third running account bill under Clause 48(b) of General

Conditions of Contract has been placed before us to say that claim of Rs. 4,500/- on account of extra expenses incurred is not allowable. Claim

No. 9 on account of reimbursement of prolonged on site expenses of Rs. 32,000/- is absolutely hit by Clause 65. Similarly extra expenditure for

payment to labour for prolongation of the work by months beyond the original period of completion under claim No. 10 is also excepted under

Clause 65 of the General Condition of Contract. Additional interest on total amount @ 18.5% per annum from first June under General Condition

of Contract is hit by Clause 13(g) are above.

7. The learned Trial Judge, according to him has, made a total guess work and if those clauses are really read and applied which have not been

done either by the learned Arbitrator or by the learned Trial Judge the interest of the claim is admissible and thereby both the authorities has

committed error in allowing legally inadmissible claim.

8. It appears that the learned Trial Judge has made guess work without any least to find which amount could be awarded by the learned Arbitrator,

and while doing so by necessary implication principle of unjust enrichment as provided u/s 70 of the Contract Act has been applied. According to

him with the support of a judgment of the Supreme Court in case of Union of India (UOI) Vs. Sita Ram Jaiswal, contends that in order to apply

this principle of section 70 of this Act the pre conditions contained in section 70 has to be fulfilled. If those conditions are not fulfilled and any relief

is granted under that section, this would be legally flawed decision, and the same is not supportable. He then with the support of the judgment of

the Supreme Court in case of Continental Construction Co. Ltd. submits that it is not permissible either by the Arbitrator or by the Court ignoring

the total prohibition in awarding price escalation clause in the contract. According to him those prohibitory clause should have been applied not

only by the Arbitrator who does not appear to have done it but also by the learned Trial Judge. Hence non-application of the contractual terms

which is mandatory in nature constitute legal misconduct and vitiates the award. According to him, if all the heads of claim are examined and it

would appear that only one claim namely refund of wrongful recovery of Rs. 30,087/- is allowable but not the interest thereof if this claim is set

apart then under no circumstances a sum of Rs. 2 lakh and odd could be awarded.

9. Learned counsel for the respondent Mr. Mukherjee on the other hand submits that when legally awarding of non speaking award and lump sum

amount is permissible it is not for the Court to probe into the mind of the learned Arbitrator. As far as the alleged prohibitory terms as against the

escalation of prices etc is concerned, he submits while supporting the judgment of the learned Trial Judge reported in Associated Construction Vs.

Pawanhans Helicopters Pvt. Ltd., that the aforesaid clause is applicable during the period when the contract subsists. The said prohibitory clause

cannot be applied after expiry of the time stipulated in the contract. In other words, if the time of completion of work is extended prohibitory clause

against escalation price will have no manner of application. It is not in dispute that the learned Arbitrator had jurisdiction to examine the terms of

contract and to adjudicate the dispute raised by both the parties. It is incorrect to allege that the learned Arbitrator has wrongfully applied the

provision of the terms of contract. He submits that the amount awarded by the learned Arbitrator is possible under the given facts and

circumstances of this case or not. This fact-finding of the learned Arbitrator is not an absurd one and the Appeal Court will not substitute the same

with its own findings. In support of his contention he has relied on the decision of the Supreme Court reported in P.M. Paul Vs. Union of India

(UOI),

10. After hearing the learned counsel for the parties and also having read the judgment it appears that the learned Arbitrator without any reason

passed a lump sum award of Rs. 2,53,000/- out of claim amount of Rs. 3,91,052.35p. Obviously, the learned Arbitrator has not awarded for the

amount claimed. In ordinary course of event learned Trial Judge should not and could not explore the possibility of awarding this amount by the

learned Arbitrator entering into the mental faculty of the learned Arbitrator. In this case the learned Trial Judge has meticulously examined the

records and read the award and in the process the learned Trial Judge as it appears from the plain reading of the impugned judgment, it is found

that it is possible to award the claim on account of Claim No. 1, Claim No. 4, Claim No. 5, Claim No. 6, Claim No. 7, Claim No. 9 and Claim

No. 10. The rest of the claim could be disallowed if the case and counter case is considered and the terms and conditions of the contract are read.

11. It is trite as urged by the learned counsel for the respondent that fact finding of the learned Trial Judge should not be upset or scrutinized just on

mere asking, but when it is urged before the Appeal Court being the last Court of the fact that it is not possible at all while reading the terms of the

contract to award the amount made by the learned Arbitrator, the Appeal Court obviously is obliged to examine this aspect. The learned Trial

Judge on the question of prohibitory clause against the claim for escalation as mentioned in Special Condition of Contract, is of the opinion that

aforesaid clause is not applicable beyond the stipulated period of the contract and this legal conclusion is also based upon the high authorities as

noted by the learned Trial Judge. In course of hearing fairly recent pronouncement of Supreme Court on this subject in case of Associated

Construction Vs. Pawanhans Helicopters Pvt. Ltd., was brought to the attention of this Court by the learned counsel for the respondent very

appropriately. In paragraph 10 of the said report in our view supports what has been found by the learned Trial Judge. Portion of paragraphs 7

and 10 of the said report are required to be reiterated here:

7.....We, are, further of the opinion that even assuming for a moment that there could be no price escalation during the period of 4 months i.e.,

during pendency of the contract such embargo would not be carried beyond that period as time was the essence that of the contract.....

10. We are, therefore, of the opinion in the light of the aforesaid judgments, that it was open to the contractor to contend that it was liable to be

compensated on account of the fact that delay had been occasioned on account of reasons attributable to Pawanhans.....

12. While reading the aforesaid judgment of the Supreme Court and also those relied on by the learned Trial Judge we are of the view that at the

time of execution of the contract the parties agreed not to claim nor to pay any extra price on account of escalation or otherwise. When this

agreement was entered into both the parties thereto were in contemplation of the reasonable escalation of price during the contractual period. But if

the completion of the work is delayed on account of lapses on the part of the employer, here appellant, and owing to such delay if there is

escalation of price in respect of the cost for the works obviously such a prohibitory clause of escalation would be absolutely hardship and it cannot

be mitigated under any circumstances. The object of justice delivery system is not to put any of the contracting parties in undue hardship so much

so their survival would be at stake.

13. It is an admitted position that works could not be completed within the time and extension was applied for and granted without any reservation

at least there is no evidence contrary to this effect in record, the original price fixed in the contract with the prohibitory clause as against escalation

could not be applied during the period of extension. What the learned Arbitrator did not do the learned Trial Judge is to do and in our view very

reasonably and appropriately His Lordship has done so. Had it not been done, gross injustice would have been meted out to the contractor. In

view of this discussion the contention raised by Mr. Roy Chowdhury is not acceptable to the Court, if accepted prohibitory clause against

escalation of price as contained in form of contract would be applicable in all the situations, even in a case where due to serious lapse of the

employer the work is prolonged the contractor will be retrievably suffering loss and injury. In our view the learned Trial Judge keeping in view of

the principle of section 70 of the Contract Act has correctly applied this principle as laid down in the said Supreme Court decision Union of India

(UOI) Vs. Sita Ram Jaiswal,). Admittedly extra work has been done and accepted by the appellant without raising any dispute, when it has been

accepted presumption is implied. No witness has come forward to state before the learned Arbitrator nor does it appear from the record placed

before us that permission was not granted. When extra work has been done and the appellant enjoyed the benefit thereof implied permission could

be inferred. We find force in the submission of the learned counsel for the respondent that the amount awarded by the learned Arbitrator as

accepted by the learned Trial Judge is not an impermissible figure, and this could be awarded. Moreover, we notice that the learned Trial Judge

has carefully excluded the other claims with reasons, namely Claim No. 2, Claim No. 3, Claim No. 8, Claim No. 11 which were found contrary to

the terms of the contract, and the same were rejected. Under these circumstances we are of the view that there was no merit in the appeal and so

the same is dismissed. The judgment and order of the learned Trial Judge is hereby affirmed.

Asim Kumar Mondal, J.

I agree.