Himachal Joint Venture Vs Panilpina World Transport (India) Pvt. Ltd.

Court: Delhi High Court

Date of Decision: Aug. 8, 2008

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 34
Contract Act, 1872 â€" Section 74
Evidence Act, 1872 â€" Section 91

Citation: AIR 2009 Delhi 88 : (2008) 3 ARBLR 497 : (2008) 106 DRJ 424 : (2008) ILR Delhi 101 Supp

Hon'ble Judges: A.P. Shah, C.J; Dr. S. Muralidhar, J

Bench: Division Bench

Advocate: Kiran Suri, for the Appellant; Sandeep Sethi and Jasmeet Singh, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

1. Aggrieved by the judgment and order dated 11th January, 2008 of the learned single Judge dismissing the appellant"s petition u/s 34 of the

Arbitration and Conciliation Act, 1996, the appellant has preferred the instant appeal seeking reversal thereof.

2. The facts leading to this appeal are that the appellant was desirous of importing Tunnel Boring Machine (""TBM"" in short) with backup system

and associated equipments from Malm, Norway and Bilbao/Spain to Adit-II site of Parbati PB-2 Project site at District Kullu, Himachal Pradesh.

The respondent being a leading company in the field of International Freight forwarding with expertise in the movement of such type of heavy

machinery submitted its quotations for executing the aforesaid shipment. After discussion and deliberations, revised quotations were submitted.

After the preparatory action and submission of offer by the respondent, the appellant issued Letter of Intent on 25th June, 2003. Formal agreement

was executed on 15th July, 2003 at Delhi. After signing of the agreement dated 15th July, 2003, certain differences occurred between the parties

owing to which the contract was eventually terminated on 2nd August, 2003.

3. The disputes between the parties resulting from the termination of the contract were referred to arbitration. This Court vide order dated 15th

March, 2004 appointed Justice Usha Mehra (Retd.) as the sole Arbitrator to resolve the disputes between the parties. The respondent filed a

statement of claim before the learned Arbitrator in the sum of Rs. 10,00,000/- towards cost incurred and for a sum of Rs. 28,28,024/- (10% of

the total contract value) as damages along with interest on the total sum @ 24% per annum. In response, the appellant filed its reply to the

statement of claims and filed its statement of counter-claims against the respondent.

4. The case of the respondent before the Arbitration was that the appellant had unilaterally terminated the contract dated 15th July, 2003 as a

result of which it had to suffer huge costs and losses. It was alleged that the termination of contract by the appellant was not only illegal but also

vitiated by mala fide inasmuch as the appellant wanted to award the contract of transportation to some other freight forwarder by the name of M/s

Jai Hind Roadways. Per contra, the case of the appellant before the Arbitrator was that the respondent had tried to make an unlawful gain at the

cost of the appellant. It was contended that whereas it was always understood between the parties that the loading and stuffing of cargo would

entail no extra cost for the appellant, however, the respondent eventually made an unlawful and unreasonable demand for a lump sum amount of

NOK 7,40,000. it was submitted that owing to the fundamental breach of the contract dated 15th July, 2003 by the respondent, the said contract

was mutually terminated by the parties. An objection to the jurisdiction of the arbitration was also raised on the ground that the claims of the

claimant are not within the scope of Arbitration Clause No. 8 of the contract.

5. The sole Arbitrator upon hearing the rival contentions of the parties and upon examination of the evidence on record, decided the issue of

jurisdiction and maintainability in favour of the respondent vide order dated 1st March, 2006. The other issues qua termination of the contract were

decided in favour of the respondent vide award dated 4th January, 2007.

6. It is seen from the judgment of the learned single Judge that the award was challenged by the appellant mainly on the following grounds:

(1) Firstly, that the impugned award deals with a dispute not contemplated and not falling within the terms of the submission to arbitration. Thus,

inasmuch as the contract was not performed at all, there was no question of execution of the contract at all, and therefore, the disputes were not

within the scope of the Arbitration Clause. The arbitral award is accordingly liable to be set aside.

(2) Secondly, that there is no evidence to show that the respondent had suffered any damage. In view of the fact that the agreement was signed on

15.07.2003 and terminated on 02.08.2003 during this period no work at all was carried out and hence there was no question of loss of profit.

7. So far as the question of arbitrability of the disputes is concerned, it was argued before the learned single Judge that the disputes, if any, which

have arisen between the parties ""during the execution "" of the agreement could only be entertained. It was urged that the agreement was terminated

immediately after the signing of the contract when it came to the notice of the appellant that the respondent had played a fraud and, therefore, the

appellant immediately rescinded the contract. The argument was that mere signing of the contract would not constitute execution of the contract.

The learned single Judge, after referring to Russell on Arbitration as well as Black''s Law Dictionary held that the execution commences from the

date of the contract dated 15th July, 2003 and, therefore, every action taken or performed from beginning till termination of the contract will fall

under the definition of ""execution of the contract"". This issue is squarely covered by the judgment of this Court in Gujarat Optical Communication

Ltd. v. Department of Telecommunications and Anr. 87 (2000) DLT 859, wherein this Court has unequivocally opined that execution starts from

the time agreement documents are signed till completion of the work. Learned Counsel appearing for the appellant has also fairly stated that she

does not want to press this point.

8. Coming then to the issue of award of damages on account of loss of profit, it is seen that the learned Arbitrator had elaborately dealt with the

decisions of the Supreme Court as well as of this Court relied upon by the parties and concluded that the appellant is entitled to and proceeded to

award 10% of the contract value under the head ""loss of profit"". Discussion in the award is reproduced below:

24. ...The law is well settled that if a breach has been committed by a party then the injured party should be compensated for the deprivation of his

profit. As already observed above the breach in this case was committed by the Respondent by illegally terminating the contract vide letter

Ex.CW1/17 dated 02.08.03. It is the Respondent who did not allow the claimant to perform his part of the contract. The claimant had been ready

and willing to carry out and to execute the contract, therefore in view of facts and circumstances of this case the Claimant is entitled to expect profit

which he would have earned had the respondent allowed the contract to be executed. So far as contention of the respondent that claimant has by

its Statement of Claim shown profit only 1.25%, it is not correct. Respondent has not taken into consideration the operating income for the two

relevant financial years and the total operating expenses which have been given at page 162 of the affidavit of CW1. Operating income less the

operating expenses is the one which will give the operating profit. On the basis of figures given therein operating profit would come more than 13%

for the two said financial years whereas claimant has restricted his claim to 10% of the cost of contract. I see no reason why claimant should not be

awarded loss of profit @ 10% of the cost of total contract, which works out to Rs. 28,28,024/-.

25. I have considered the submissions of Mr. Srivasta that the claimant had to prove actual loss or actual profit which he would have earned. I find

no merits in this submission in view of the law laid down by Delhi High Court and the Apex Court referred to above. As already mentioned above,

Supreme Court in the case ""DWARKA DASS"" (Supra) observed that 10% of the contract price can be awarded as damages for illegal breach of

the contract. It is not necessary that actual loss should have been suffered. The judgment of the Supreme Court Petlad Turkey Red Dye Works

Co. Ltd. (Supra) does not apply to the facts of this case. In that case Apex Court observed that actual utilization of money must be proved by

some other way and not by mere production of balance-sheet. But that is not the case in hand. It is the expected profit which can be allowed. In

this case relying on the facts & legal position discussed above, I have come to the conclusion that the claimant is entitled to 10% of the contract

price as loss of profit which works out to Rs. 28,28,024/-. Besides loss of profit, the claimant is also entitled to a sum of Rs. 31,667/- being the

actual expense incurred by it after the execution of the contract dated 15.07.2003. I award the above amounts in favour of the claimants.

9. Learned Counsel appearing for the appellant strenuously argued that the claim for loss of profit ought not to have been awarded in the absence

of any evidence produced by the respondent. She submitted that the loss of profit is required to be proved by cogent evidence. We are afraid that

the issue is no more res integra and is covered by at least two decisions of the Supreme Court. In A.T. Brij Paul Singh and Others Vs. State of

Gujarat, , a three Judge Bench specifically dealt with the issue of entitlement of loss of expected profit in the work. In that case the trial court

categorically held that the respondent was guilty of breach of work contract, part of which was already performed and for which the appellant had

transported machinery and equipment from Pune to the work site near Rajkot in Saurashtra, and the appellant would be entitled to damages. One

of the heads of damages under which claim was made was ""loss of expected profit in the work"". The claim under this head as canvassed before the

High Court was in the amount of Rs. 4,30,314/-, which came to be rejected by the trial court for want of proof. The High Court after holding that

the respondent was not justified in rescinding the contract proceeded to examine whether the plaintiff - contractor was entitled to damages under

the head ""loss of profit"". In this connection the High Court referred to Hudson''s Building and Engineering Contracts (1970), tenth edition and

observed that ""in major contracts subject to competitive tender on a national basis, the evidence given in litigation on many occasions suggests that

the head-office overheads and profit is between 3 to 7 per cent of the total price of cost"" which is added to the tender. In other words, the High

Court was of the view that the claim under this head was admissible. The High Court, however, proceeded to reject the claim observing that the

bare statement of the partner of the contractor''s firm that they are entitled to damages in the nature of loss of profit at the rate of 20 per cent of the

estimated cost is no evidence for the purpose of establishing the claim. Allowing the appeal, the Supreme Court held as under:

10. Mr. Aneja, learned Counsel for the appellant urged that the appellant was placed at a comparative disadvantage on account of his two appeals

arising from two identical contracts inter parties being heard on two different occasions by two different Benches even though one learned Judge

was common to both the Benches. Mr. Aneja pointed out that in the appeal from which the cognate Civil Appeal No. 1998/1972 arises, the same

High Court in terms held that the claim by way of damages for loss of profit on the remaining work at 15% of the price of the work as awarded by

the trial court was not unreasonable. The High Court had observed in the cognate appeal that ""the basis adopted by the learned Civil Judge in

computing the loss of profit at 15% on the value of the remaining work contract cannot be said to be unreasonable"". In fact, the High Court had

noticed that this computation was not seriously challenged by the State, yet in the judgment under appeal the High Court observed that actual loss

of profit had to be proved and a mere percentage as deposed to by the partner of the appellant would not furnish adequate evidence to sustain the

claim. In this connection the High Court referred to another judgment of the same High Court in First Appeal No. 89 of 1965 but did not refer to

its own earlier judgment rendered by one of the Judges composing the Bench in First Appeal No. 384 of 1962 rendered on 3/6 July, 1970

between the same parties. When this was pointed out to Mr. Mehta, his only response was that the court cannot look into the record of the

cognate appeal. We find the response too technical and does not merit acceptance. We are not disposed to accept the contention of Mr. Mehta

for two reasons: Firstly, that in an identical contract with regard to another portion of the same Rajkot-Jamnagar road and for the same type of

work, the High Court accepted that loss of profit at 15% of the price of the balance of works contract would provide a reasonable measure of

damages if the State is guilty of breach of contract. The present appeal is concerned with the same type of work for a nearby portion of the same

road which would permit an inference that the work was entirely identical. And the second reason to reject the contention is that ordinarily a

contractor while submitting his tender in response to an invitation to tender for a works contract reasonably expects to make profits. What would

be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is

implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract

cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the

vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15% of the

value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit. We are therefore, of the opinion

that the High Court was in error in wholly rejecting the claim under this head.

11. Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is

held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way

of loss of profit, Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the

same type of work at 15% of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.

10. In Mohd. Salamatullah and Others Vs. Government of Andhra Pradesh, the then Hyderabad Government had placed orders with the plaintiffs-

appellants for manufacture of certain number of guns, the price per gun being put at Rs. 125/-. Although some of the guns were manufactured the

contract could not be completed and it was held concurrently that there was a breach of contract on the part of the plaintiff. Although the plaintiff

had claimed a much larger sum, the State, through its counsel, pointed out that the plaintiffs themselves had estimated the margin of profit at a sum

of Rs. 1,87,500/- which worked out to 15 per cent of the total amount invested in the gun-making. Based on this argument of the government

counsel, the trial court awarded the aforesaid sum of Rs. 1,87,500/-. In appeal, however, the High Court observed that it will be just and

reasonable to put this profit at 10 per cent of the contract price which works out to Rs. 1,25,000/-. The Supreme Court restored the order of the

trial court by observing as under:

We are not able to discern any tangible material on the strength of which the High Court reduced the damages from 15% of the contract price to

10% of the contract price. If the first was a guess, it was at least a better guess than the second one. We see no justification for the appellate court

to interfere with a finding of fact given by the trial Court unless some reason, based on some fact, is traceable on the record. There being none we

are constrained to set aside the judgment of the High Court in regard to the assessment of damages for breach of contract. We restore the award

of Rs. 1,87,500 made by the trial Court on account of estimated profits (it transpires that when the trial Court passed the decree the amount was

recovered by the appellants with the result that there was nothing more to be paid by the State to the respondents herein).

11. Learned Counsel appearing for the appellant, however, submitted that in a recent decision in Bharat Coking Coal Ltd. Vs. L.K. Ahuja, , a two

Judge Bench of the Supreme Court has taken a different view. According to her in that case the Supreme Court has clearly held that in the absence

of any evidence led by the claimant to substantiate loss of profit, the Arbitrator ought not to have passed award under that head. We are unable to

agree with the learned Counsel. In that case, Claim No. 9 was for loss arising out of turnover due to prolongation of work and the claim made

under that head was in a sum of Rs. 10 lacs. The Arbitrator held that on account of escalation in wages and prices of materials, compensation was

obtained and, therefore, there was not much justification in asking for compensation for loss of profits on account of prolongation of the work.

However, the Arbitrator came to the conclusion that a sum of Rs. 6 lacs will be appropriate compensation in a matter of such nature, being 15% of

the total profit over the amount that has been agreed to be paid. While a sum of Rs. 12,00,00/- would be appropriate entitlement, he held that a

sum of Rs. 6,00,00/- would be the appropriate entitlement. He also awarded interest on the amount payable at 15% p.a. Allowing the appeal, the

Supreme Court held that when the claim for escalation of wage bills and price of materials compensation has been paid and compensation for

delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult to

accept the proposition that in addition, 15% of the total profit should be computed under the heading "Loss of Profit". It was observed that it is not

unusual for the contractor to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work.

What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some

other business in which he could have earned profit. Unless such a plea was raised and established, claim for loss of profits could not have been

granted. In the absence of any evidence, the arbitrator could not have awarded the same. The question before the Court was about the loss of

profit arising out of diminution in turn over on account of delay in completion of the work. Moreover the Court was of the opinion that when the

claim for escalation of wage bill and prices of materials is accepted and when the compensation for delay in payment of the amount payable under

the contract and for other extra work is to be paid by way of interest, there was no justification for a separate claim for loss of profit. This would

virtually amount to claiming compensation twice under the same head. This decision has no application to the facts of the present case.

12. The Division Bench of this Court in Delhi Development Authority Vs. Polo Singh and Co., has held that 10% of the contract value was fair and

reasonable basis to work out amount of loss of profit.

13. We may mention that the learned Counsel tried to derive some support from the Supreme Court decision in Maula Bux Vs. Union of India

(UOI), . That judgment is an authority for the proposition that forfeiture of reasonable amount paid as earnest money does not amount to imposing

a penalty. But if forfeiture is of the nature of penalty, Section 74 of the Contract Act applies and in such cases forfeiture is not permissible unless

the actual loss is proved. We fail to see as to how this judgment has any application in the present case where the claim is for loss of profit on

account of illegal termination of contract.

14. The next submission of the learned Counsel for the appellant is that the agreement was terminated by mutual consent at the meeting held on

2nd August, 2003. There were unresolved disputes between the parties and a meeting was in fact held on 2nd August, 2003. Learned Counsel

submitted that the respondent was represented at the meeting by one Mr. Indroneel Sen and one Ms. Preeti Virmani. Both the persons were not

examined by the respondent. Their depositions would have been the best evidence in support of the respondent''s case. Learned Arbitrator had a

duty to draw adverse inference against the respondent for withholding evidence in his possession.

15. The learned Arbitrator has considered this issue in depth and recorded a finding in paragraphs 14 and 16 of the said Award, which reads as

follows:

14. That written terms of an agreement has sanctity in law. These will prevail over verbal assertions. What transpired prior to reaching a concluded

contract cann''t alter the terms and conditions of a concluded written contract. Supreme Court in the case of Roop Kumar Vs. Mohan Thedani,

held that Section 91 of the Evidence Act relates to evidence of terms of contract, grants and other disposition of properties reduced to form of

document. This section forbids proving the contents of a writing otherwise than by writing itself. Similar view was formed by the Apex Court in the

case of M/s. Fabril Gasosa Vs. Labour Commissioner and others, wherein Apex Court observed that when terms of contract on settlement in the

form of document are proved as per Section 91, no evidence of any oral argument of settlement shall be admitted between parties. Similar view

was expressed by Supreme Court in the case of New India Assurance Co. Ltd. v. Kusumandi Kaneshwara Rao (1997) 9 Sec. 170 Delhi High

Court also took same view in the case of Gun Malla Rajgarahia Vs. Canara Bank and Another, . Supreme Court in the case of Dresser Rand S.A.

Vs. BINDAL Agro Chem Ltd. and K.G. Khosla Compressors Ltd., held that a prelude to a contract should not be confused with the contract

itself. Parties do enter into discussions, negotiations and deliberations but what ultimately culminate into a contract, terms of the same are binding

unless those terms are against law. That is not the case herein. Parties to the contract are bound by the terms of the contract. The agreement dated

15.7.2003 stipulates the scope of work ""Ex-work-FOT"" which terms is binding on the parties. It is unbelievable that a company of respondent''s

repute would insert a material term in the written agreement on a verbal suggestion or assurance of an other party made in a very casual manner. If

Mr. Sen had assured that claimant would not claim additional amount for stuffing and loading on trailers then such an assurance ought to have been

obtained in writing and incorporated in the agreement. Reading of Para 9 of Ex.CW-1/16, letter of respondent dated 30.07.03 shows the

objection to the term ""FOT"" was taken for the first time by the supplier (NCC), and thereafter, the respondent in order to wriggle out of the written

terms of the agreement set up the story of verbal request and assurance.

16. It is not believable that the claimant agreed verbally to terminate the contract particularly when the claimant had made elaborate arrangement

for the execution of this contract. It is unbelievable and unconceivable to accept the argument of the respondent that verbal consent was given to

terminate the contract. Respondent even did not bother to find whether those two personnel''s of the claimant had the authority to do so. In fact, I

find force in the submission of Mr. Sandeep Sethi, Senior Advocate that respondent wanted to terminate this contract because it had made

arrangement with another agency i.e. M/s. Jai Hind Roadways. No credence can be attached to the verbal statement of respondent''s witness in

the absence of any documentary evidence. Hence it can safely be concluded that the agreement was not terminated mutually but was terminated

unilaterally.

16. In our opinion, the above view taken by the Arbitrator is plausible view and it is not permissible for this Court to interfere with the Arbitrator''s

view merely because another view of the matter is possible.

17. Learned Counsel for the appellant has also raised a contention that the term ""FOT"" was inserted by the respondent fraudulently and the

appellant realised later that the respondent wanted to impose an additional financial burden on the appellant. She submitted that the learned

Arbitrator had proceeded as if the appellant"s witnesses admitted that the other contractor had been taken to Oslo even when the contract with the

respondent was alive. According to her it is total misreading of the evidence of the appellant"s witness. We are afraid that it is not permissible for

this Court to re-appreciate the evidence placed before the Arbitrator. It is well settled that the Arbitrator is the best judge of the quality as well as

quantity of evidence and it will not be for the Court to take upon itself the task of being a judge of the evidence before the Arbitrator.

18. In our view, this appeal is devoid of any substance and is hereby dismissed.