(2013) 05 DEL CK 0432

Delhi High Court

Case No: CS (OS) No. 3024 of 2012 and I.A. No. 20666 of 2012

Bharat Sanchar Nigam Ltd.		APPELLANT
	Vs	
M/s. Anand Brothers Pvt. Ltd. and Another		RESPONDENT

Date of Decision: May 31, 2013

Acts Referred:

- Arbitration Act, 1940 - Section 30, 33
- Arbitration and Conciliation Act, 1996 - Section 34

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: R.V. Sinha, with Ms. Sangeeta Rai, for the Appellant; Gurmehar S. Sistani, for D-1, for the Respondent

Judgement

Manmohan Singh, J.

The plaintiff/objector, Bharat Sanchar Nigam Ltd. has filed the objections under Sections 30 & 33 of the Arbitration Act, 1940 for setting-aside the Award dated 25th June, 2010 passed by the sole Arbitrator. Brief facts are that the agreement No. 21/EE/(E)-II/1990-91 for carrying out the work called P/I Automatic Wet Riser Fire Fighting System at T.E. Building, Tis Hazari, New Delhi was executed by and on behalf of the Union of India and defendant No. 1. Consequent upon the formation of Bharat Sanchar Nigam Ltd. w.e.f. 1st October, 2000 in terms of the policy decision of the Central Government, the assets and liabilities of the Central Government stand transferred in favour of the plaintiff and thus, the present suit relating to the dispute arising out of the aforesaid agreement, previously executed by and on behalf of the Union of India, is being filed by the plaintiff.

2. The dispute between the parties arose leading to the appointment of Arbitrator Sh. B.V. Ramanamurti. The said Arbitrator gave his award dated 31st May, 1995. The award was partially set aside by this Court vide order dated 21st February, 2005 in CS(OS) No. 1622A/1995 and I.A. No. 2630/1997 and it was further directed for

appointment of Arbitrator who was to decide afresh the Claims No. 1, 2, 4 & 7. In terms of the said directions, Sh. Amar Relan, SE(E), BSNL, Meerut was appointed as Arbitrator. However, he was subsequently changed and the defendant No. 2 was appointed as Arbitrator in his place.

3. The defendant No. 2 has given his Award dated 25th June, 2010. Thereafter, the objector filed application for direction to the learned Arbitrator to file the Award as well as the arbitration proceedings before this Court and the same was registered as I.A. No. 16143/2010 before this Court. After hearing the matter, this Court directed the learned Arbitrator to file his Award along with the arbitration proceedings and after filing of the same, this Court by its order dated 12th September, 2012 issued formal notice to the parties regarding filing of the Award dated 25th June, 2010 passed by the learned Arbitrator and the same was accepted by the respective counsel for the parties and this Court ordered that it would be open to the parties to take appropriate further steps in accordance with law. Reply to the objections has not been filed by the defendant No. 1. The statement was made by the learned counsel that he would argue the matter by relying upon the pleadings and documents available on record.

4. The main contention of the learned counsel for the plaintiff is that the learned Arbitrator has passed the impugned Award in a mechanical manner without applying the judicial mind. During the course of hearing, it was only argued by him that no reasons have been given by the sole Arbitrator after the direction issued by this Court to decide afresh the Claims No. 1, 2, 4 & 7. According to him, the Arbitrator has merely allowed the claims, as if there were direction by the Court to allow the same and he passed the Award without going into the pleadings and material available on record with regard to Claims No. 1, 2, 4 & 7 raised by the defendant. The question of awarding the interest @ 12% from 24th April, 1993 was also illegal, as no interest upon the interest can be granted to be paid in such cases. Thus, the Award is liable to be set-aside.

5. After having gone through the Award dated 25th June, 2010 passed by the sole Arbitrator, it is evident that the arguments addressed by the learned counsel for the plaintiff are without any substance, as it appears that all the claims were discussed and decided in detail by the sole Arbitrator. The findings arrived by the sole Arbitrator in Claims No. 1, 2, 4 & 7 are reproduced here below:-

Claim No. 1:- Claim of Rs. 1,35,000/- on account of short payment

The claimant has submitted that the quantities of some of the items were executed beyond the agreement quantities. These quantities were executed beyond agreement period and the deviation clause if applicable shall holds good only for the agreement period. The EOT was granted without levy of compensation due to the delay on the part of respondents. The claimant demanded the payment of the deviated quantities as per market rates. The respondents submitted that the

payment was made as per the terms and conditions of the agreement and nothing extra is payable. The Hon''ble High Court Delhi in the order dated 21.02.2005 vide para 5 & 6 mentioned that the principles decided in the case of Rawla Construction Co. Vs. Union of India, are also applicable in this case, vide which it was decided that the claimant is entitled for the compensation on account of the increase in cost of construction material or extra expenditure on overhead and establishment charges because these are the consequences of the breach of contract by the Government whereby the period of performance is lengthened and extended beyond the time originally fixed in the contract. The claimant has submitted that Clause 10CC was not applicable in the agreement but the agreement was extended to 21 months instead original agreement period of six months, thus clause 10CC should have been applicable. The claimant has submitted their claim amount of Rs. 195928/- based on market rates and also worked out to Rs. 115397/- which was corrected to Rs. 91371/- based on Clause 10CC of the agreement considering that Clause 10CC is applicable. The respondents did not submit any calculation in counter to the claimed amount and said that the payment as per agreement was made and nothing extra is payable. The claimant during hearing did not press for the claim based on market rates and himself modified his claim amount based on reasonability to the amount of Rs. 91371/- after excluding the 10CC amount of the agreement period.
After considering the order of the Hon''ble High Court and the submissions made by the claimant it is found that the amount claimed by the claimant based on Clause 10CC is quite reasonable and systematic and within the provisions of the agreement clause, which are applicable in the case of respondent''s other agreements, where the agreement period is more than six months. Therefore, I find that the claim amount to the extent of Rs. 91371/- is justified.

AWARD:- Thus the awarded amount under this claim has been worked out to Rs. 91371/-.

Claim No. 2:- Claims of Rs. 65000/- on account of Non Payment

The claimant had executed certain extra items during execution of main work and they had written letters to respondents for payment of these extra items. The claimant relied on C-2 and C-6. The claimant has modified their claim amount to Rs. 35550/- against the original claim amount of Rs. 65000/-. As already observed by the Hon''ble High Court Delhi in para 6 of order dated 21.05.2005 extra items executed by the claimant should have been paid by the respondents.

Therefore, I find that the claim of the claimant is justified to some extent and has been worked out as below:-

1. Item No. 1 is Making good of cement concrete road which is amounting to Rs. 18900/-. As per extra item statement the cutting of CC flooring (road) was paid for 208.30 m but repair of the same was not paid, the respondents agreed that this item was not included in the item of main work. Hence, the respondents will pay for

repair of CC flooring for 208.30 m @ Rs. 90/- per metre. Thus, an amount of Rs. 18747/- is awarded.

2. Item No. 2 is Concrete and bricks support for laying CI pipe on ground. The claimant claimed this item as per C-6. The respondents agreed that it is possible that some pipes might have been laid on surface. The claimant had already claimed this item during execution of the work on 27.05.1991. Thus, an amount of Rs. 5250/- is awarded.

3. Item No. 3 is Roof cutting and making good for erection of riser. The claimant claimed this item vide C-6 @ Rs. 110/- per hole during execution of work and the respondents submitted that this type of work is generally not included in the main item of the work. Thus, an amount of Rs. 660/- is awarded.

4. Item No. 4 is Wall cutting and making good for riser entry. The claimant submitted that riser was to be raised through roof for which risers were entered inside building by cutting the walls. Respondents submitted that for providing risers these are needed to be entered inside building and for which walls are to be cut. Thus an amount of Rs. 2800/- is awarded.

5. Item No. 5 is shifting of 4-way FBC. The claimant relied on C-8 vide which claimant was asked for relocation of FBC by the respondents but the same was not paid. Thus, an amount of Rs. 6500/- is awarded.

AWARD:- The total amount under this claim has been worked out to Rs. 33957/- and the same is awarded.

Claim No. 4:- Claim of Rs. 3,10,000/- on account of prolongation of contract

The work was completed with delay of about 15 months for which extension of time was granted by the respondents without levy of compensation. The Hon''ble High Court Delhi vide para 6 of the order dated 21.05.2005 has also observed that the petitioner is liable to be compensated for extra expenditure on overheads and establishment charges, to the extent of the contract being carried out beyond the original terms for factors not attributable to the petitioner. The claimant during hearing submitted that they were not informed regarding closures of the work due to which they could not mitigate their losses. The claimant has filed copies of judgments delivered by Calcutta High Court in case of Deo Kumar Saraf v/s UOI, by Punjab & Haryana High Court in Civil Revision No. 1026 of 1987 and by Delhi High Court in IA No. 970 of 94 & S. No. 2472/93 in support of claim of damages. The respondents submitted that EOT was granted without levy of compensation on the undertaking of the claimant. The claimant has submitted details of their claim vide annexure-II making claim amount to Rs. 343500/- against the claim amount of Rs. 310000/-. The claimant simply claimed amount giving details of certain description of items. After scrutiny of the claimed figures it is observed that the claimant has claimed constant expenditure on Site Engineer during entire period which is not

justified as Site Engineers are not placed for only one site by the contractors. Similarly others items claimed are also not required constantly at site. I therefore, after considering different judgments and direction of Delhi High Court in this matter, find that the minimum expenditure on account of overhead & establishment required at site shall be as below:-

Thus the total amount under this claim has been worked out to Rs. 4733/- per month for 15 months thus making it to Rs. 70995/-.

AWARD:- The amount of Rs. 70995/- is awarded under this claim.

Claim No. 7:- Rs. 75000/- on account of infructuous hire charges

The claimant submitted that welding sets and other machinery were kept at site and claimed an amount of Rs. 27000/- which could have been avoided. The respondents denied this claim since claimant did not incurred this expenditure. The claimant could have avoided this expenditure by redeploying this machinery. Hence, the claim is not found justified.

AWARD:- Therefore, the award amount in this claim is NIL.

6. In view of the above said findings arrived by the learned sole Arbitrator, the question before the Court is as to whether said findings are liable to be set-aside in view of the objections filed by the plaintiff under Sections 30 & 33 of the Act.

7. The Arbitrator after considering the rival contentions of the parties and documents filed and evidence adduced or produced before him has come to a finding of facts based thereon which is final and binding as this Court is not sitting in appeal over the award of the Arbitrator and would not go into the merits of the case and would not appreciate the evidence and documents before the Arbitrator. View/interpretation of a contract or document or evidence as taken by the Arbitrator is final and binding even if erroneous but a plausible view.

8. The Arbitrator has given reasons and his thought process or accepting or rejecting a contention or claim of any party and the Court in objections to the award would not go into reasonableness of reasons as the Arbitrator is not supposed to write a detailed judgments like that of the court. It has been so held by the Hon''ble Supreme Court in the following judgments:

(i) Sudarsan Trading Co. Vs. Government of Kerala and Another, , para 29 regarding reasons and appreciation of evidence and para 31 that court cannot substitute the view of the arbitrator and interpretation given to a document or contract.

(ii) Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, . Both the above judgments are under old Act.

(iii) In a judgment u/s 34 of the Act of 1996, the Hon''ble Supreme Court in the case of Mcdermott International v. Burn Steel reported in 2006 (2) ALR 498 (SC) in para 55

has held that court cannot correct the errors of the Arbitrator and the interference by the Court is envisaged only in case of fraud or bias or violation of principles of natural justice; in para 117 how computation of the award of damages is to be done is within the jurisdiction of the arbitration only; para 119 that construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the vide nature, scope and ambit of arbitration agreement and correspondence exchanged between the parties is to he taken into account for construction of contract and construction of contract is within domain of the Arbitrator to determine; para 140 finding arrived by the Arbitrator on appreciation of evidence cannot be said to the perverse.

(iv) J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, ; para 10 that a civil court examining the validity of award u/s 34 exercises supervisory jurisdiction and not the appellate jurisdiction; para 22 and 23 who was responsible for delay in execution of the work is arbitrable dispute within jurisdiction of the Arbitrator; para 27 court can set aside award u/s 34 only if it is in conflict with public police i.e. (a) contrary to fundamental policy of India or (b) contrary to interest of India or (c) contrary to justice or morality or (d) patently illegal. The patent illegality should go to the root of the matter and not a trivial illegality or if shocks the conscience of the Court.

From the perusal of the award of the Arbitrator, it appears that in fact, the Arbitrator has noted all the contentions of both the parties with regard to facts and claims of the claimant. Therefore, the objections filed by the plaintiff are liable to be dismissed.