Gangadeep Builders Pvt. Ltd. Vs Mahanagar Telephone Nigam Ltd.

Court: Delhi High Court

Date of Decision: May 14, 2009

Acts Referred: Arbitration Act, 1940 â€" Section 16, 30, 33, 5
Arbitration and Conciliation Act, 1996 â€" Section 20, 21

Hon'ble Judges: Vipin Sanghi, J

Bench: Single Bench

Advocate: Rohit Puri, for the Appellant; Harish Malhotra and Dipesh Sharma, for the Respondent

Judgement

Vipin Sanghi, J.
These are objections preferred by the respondent MTNL to the award passed by the learned Arbitrator Sh. N.K.

Singhal, who was appointed as the sole Arbitrator to adjudicate the claims and counter- claims of the petitioner/claimant and respondent/non-

claimant in relation to the disputes which arose out of contract for construction of Local Duct Network in Karol Bagh Exchange area bearing

Contract No. 04/22/90. The learned Arbitrator was appointed by the Chief General Manger, Delhi Telephones vide letter dated 20.05.1997. I

may notice at this stage that the arbitration agreement was invoked by the petitioner on 01.12.1993 calling upon the respondent to appoint an

Arbitrator. Thereafter, the petitioner preferred Suit No. AA 62/96 u/s 20 of the Arbitration and Conciliation Act, 1940 in this Court on

17.05.1996. The said petition was disposed of by this Court on 22.04.1997 directing the respondent to appoint the sole Arbitrator in terms of the

contract. It appears that only thereafter on 20.05.1997, the Chief General Manager appointed Mr. N.K. Singhal as the sole Arbitrator. By virtue

of Section 21 of the Arbitration and Conciliation Act 1996, the arbitral proceedings in respect of the claims of the petitioner commenced with the

request for them to be referred to arbitration being made and received in December, 1993, i.e. prior to the coming into force of the 1996 Act.

Consequently, the arbitration award in question is governed by the Arbitration Act 1940. I may also notice that the parties have also proceeded on

the foundation that the arbitration proceedings and the award are governed by the provisions of the Arbitration Act 1940. Consequently, the

respondent has preferred the objections u/s 5, 16, 30, 33 of the Arbitration Act, 1940. The same have been filed on 11.01.2000 though the award

was made by the Arbitrator on 01.05.1999.

2. Mr. Harish Malhotra, learned senior counsel for the respondent/objector has argued specific objections in relation to Claim Nos. 1, 2, 3, 6, 9,

12 and 14 and the award made on counter-claim Nos. 1, 2 and 3. Claim No. 1 was made by the petitioner/claimant on account of escalation in

the price of PVC Pipes. Before the sole Arbitrator the said Claim was made for Rs. 20,63,255/-. The amount was revised to Rs. 11,35,151/-

before the Arbitrator. The learned Arbitrator has allowed this claim for Rs. 11,35,151/-.

3. The basis for making this claim was that the respondent MTNL had not allowed escalation in PVC Pipes prices beyond the extended date of

completion on the plea that the contractor had failed to complete the work.

4. The learned Arbitrator returned the finding that permission for road cutting was not available from MCD in such a manner that work could be

continuously carried out. In fact, the contractor continued to execute the work even when permission was not available. This caused losses by way

of material and T&P being taken away and the labour of the contractor being disbanded by the MCD staff. The Arbitrator held that the period of

completion of eight months was fixed by not taken into consideration the possibility of the road cutting permission not being available.

5. The learned Arbitrator made his award by taking into consideration para 8 of Clause 70 on page 120 of the agreement which reads as follows:

The escalation of price on PVC pipe is applicable only upto the original date of completion as per stipulation in the contract. However, if the delay

in completion is beyond the control of the contractor and works are agreed to be executed beyond the stipulated completion period, such

escalation / de- escalation is permissible.

6. It is also seen that so far as the quantity and the rates of PVC pipes are concerned, the learned Arbitrator adopted the quantity and rate as

verified by the respondent in its letter dated 15.04.1999.

7. There is no objection raised by the respondent to the recording of these facts and figures. The only submission of Mr. Malhotra, learned senior

counsel for the objector was that for the period after extension of time had expired, and no further extension had been granted, no escalation could

be awarded. He also submitted that sales tax and transportation was not to be paid since it was included in the price. He further submits that the

learned Arbitrator held that the contractor was not to blame for delay as road cutting permission was not available. He submits that at the same

time, even the MTNL was not responsible for the said permission not being granted by MCD and, therefore, the MTNL could not be saddled

with the escalation costs.

8. In my view, there is no merit in these objections of the respondent. On a reading of the award, the period for which the escalation has been

awarded is not discernible. The award has been made under Arbitration Act 1940 and there was no contractual requirement that the award had to

contain reasons. Even otherwise, since the petitioner/claimant had continued to execute the works even beyond the period for which extension was

granted, the claimant would be entitled to claim escalation since it was established before the learned Arbitrator that the petitioner/claimant was not

responsible for delay in the execution of the work. So far as the submission with regard to the inclusion of sales tax and transportation in the claim

for escalation is concerned, I see no merit in the same as the quantity and rates for computation of escalation were verified by the respondent.

There is nothing to suggest that the escalation awarded is inclusive of sales tax and transportation.

9. Merely because the respondent consider itself not responsible for the road cutting permission not being available, it does not follow that the

contractor could have been asked to bear, or even share the burden of escalation on account of such permission not being available. Admittedly, it

was for the respondent to arrange for, and obtain the necessary permission for road cutting from the MCD. If the same was not so arranged, the

burden would fall on the employer/respondent and not on the contractor. Consequently, I reject the objections to the award on Claim No. 1.

10. So far as Claim No. 2 is concerned, the same was made for Rs. 4,55,000/- for work done but not paid. The amount was reduced to Rs.

3,58,206/- vide letter dated 09.11.1998 before the Arbitrator. The finding of the learned Arbitrator on this Claim is a pure finding of fact. He has

held that the work had been carried out as per the directions of the respondent and he has allowed the same partly for Rs. 45,000/-. In my view,

there is no merit in the objection to this particular Claim and no specific objection has been raised by the respondent.

11. Claim No. 3 was made by the claimant/petitioner for Rs. 8,11,882/- towards refund of retention money lying with the respondent. This

included retention money in cash as well as in the form of bank guarantees. The only justification given by the respondent for retaining the retention

money was that the work had not been completed and tested. The learned Arbitrator held that after the abandonment of the work, since 1993 no

effort was made by the respondent to get the work completed. The cost adjustment for deficiencies in work has been separately discussed in

Claim No. 12. In these circumstances the learned Arbitrator allowed the refund of Rs. 5,79,703.80/- which had been deducted in cash, and

released by bank guarantees of Rs. 2,32,178.20/-.

12. Mr. Malhotra argued that the learned Arbitrator had wrongly concluded that no action has been taken by the respondent to get the work

completed. However, he has not been able to point out from the record as to how the said finding could be said to be perverse or contrary to the

record. Since the work had to be abandoned as the road cutting permission was not available, in any event, there could be no justification for

withholding the retention money of the claimant. I find no error in the award made on Claim No. 3. The objection of the respondent is, therefore,

rejected.

13. In respect of Claim No. 6, which was made for Rs. 22,95,000/- on account of loss of idle staff and establishment, the learned Arbitrator

awarded the amount of Rs. 3,52,550/-. The learned Arbitrator restricted the Claim on the ground that it was well within the knowledge of the

contractor that road cutting permission is not within the hands of the respondent. Further, work had been stopped due to non-payment of

escalation charges.

14. The submission of Mr. Malhotra is that the learned Arbitrator has not given any reasons for arriving at the amount of Rs. 3,52,550/- awarded

by him on Claim No. 6. As aforesaid, there was no obligation for the Arbitrator to give a reasoned award. It is not open to the court to go behind

the award and to enquire into the reasons which may have prevailed upon the Arbitrator in making his award. Consequently, I reject the objection

made by the respondent to the Claim No. 6. Same is the position with regard to Claim No. 7 which had been made by the claimant for Rs.

66,51,500/- towards hiring charges/depreciation of machinery, and had been allowed by the Arbitrator to the extent of Rs. 1,00,000/-.

15. Claim No. 9 had been made by the claimant for Rs. 5,00,000/- as bank charges/commission for extending bank guarantees beyond stipulated

period. The Claim had been revised to Rs. 91,984/- vide letter dated 09.11.1998. The learned Arbitrator hold that since the work had not been

completed due to various reasons beyond the control of both the parties, the actual expenditure incurred by the claimant should have been

reimbursed. Consequently, the Claim was allowed for Rs. 91,984/- and the respondent was also directed to release the expired bank guarantee

within 30 days from the publication of the award. I find no merit in the objection raised to this part of the award on account of the extension of the

contract. The claimant could not have been made to suffer towards bank charges/commission for extending the validity of the bank guarantee. The

objection to the award on Claim No. 9 is, therefore, rejected.

16. So far as Claim No. 12 is concerned, I find that no objection has been raised in the objection petition to the award on Claim No. 12.

Consequently, I do not consider it necessary to go into the objection argued by Mr. Malhotra.

17. The next objection raised by Mr. Malhotra is to the award made in Claim No. 14 which was the claim for interest at the rate of 24% per

annum. The learned Arbitrator awarded simple Interest at the rate of 16.5% on the amount of Rs. 23,64,388.80/- which is the aggregate of

amount awarded on Claim Nos. 1, 2, 3, 6, 7, 9 and 12 w.e.f. 01.12.1993 to 30.04.1999 (the award was made on 01.05.1999). The amount of

interest for the aforesaid period has been worked out at Rs. 21,13,171.20/-. Further interest at the rate of 15 per cent has been allowed on the

amount of Rs. 45,27,560/- which is the aggregate of the principle awarded amount of Rs. 23,64,388.80/- and the interest thereon calculated up to

30.04.1999. The Arbitrator has awarded interest on the aforesaid aggregate amount at the rate of 15% per annum in case the payment is not made

within 60 days from the date of publication of the award till payment.

18. The submission of Mr. Malhotra is that the Arbitrator has, in the aforesaid manner, awarded compound interest, inasmuch as, on the amount of

Rs. 21,13,171.20/- which was the component of interest for the period of 01.12.1993 to 30.04.1999 further interest has been awarded at the rate

of 15% per annum. He also submits that the rate of interest awarded by the learned Arbitrator is on the higher side.

19. Having considered the submissions of the parties, I am of the view that the learned Arbitrator could not have awarded interest on interest.

There was no agreement between the parties for award of interest to the petitioner/claimant. Even otherwise, I find that the rate of interest awarded

is on the higher side considering that in such like awards, the interest at the rate of 9-12 per cent has been maintained by the courts. Consequently,

I modify the award on Claim No. 14. The rate of interest for all the periods is reduced from 16.5% and 15% to 9% per annum. It is further

directed that on the amount worked out as interest for the period 01.12.1993 to 30.04.1993, on the principle awarded amount or Rs.

23,64,388.80/-, no further interest shall accrue and interest shall continue to run only on the principle liability of Rs. 23,64,388.80/- at the

aforesaid rate of 9% per annum till realization.

20. Mr. Malhotra has then submitted that the award on Counter- claim No. 1 is erroneous. The MTNL had made the said Claim to recover the

road restoration charges paid by the MTNL from the petitioner claimant. The said claim was rejected by holding that there is no such provision in

the contract for the contractor to bear such charges. I find no error in the award since no clause of the contract has been placed before me which

fastens the liability towards payment of road restoration charges on the contractor. Objection to the award on Counter-claim No. 1 is, therefore,

rejected.

21. In respect of Counter-claim No. 2, which was made for Rs. 1,17,532/- towards repair charges payable to MCD for 12 dia water pipeline, I

find that the claimant had agreed to pay the amount as per actual expenditure incurred by MTNL towards the said repair. It was for the

respondent MTNL to substantiate the said claim to claim reimbursement. However, it appears that was not done. In view of the aforesaid, there

possibly cannot be any objection to the award made by the Arbitrator. The award on Counter-claim No. 2 is therefore rejected.

22. Counter-claim No. 3 was made towards liquidated damages towards 10% of the contract value. The learned Arbitrator has rejected the same

and, in my view, rightly so by holding that the work had been delayed beyond the control of both the parties and, therefore, levy of such

compensation was not justified. Only in the event of it being established that the delay in the execution of the work was attributable to the claimant

contractor, liquidated damages could have been imposed under the contract. Since that is not the case, in my view, no error can be found in the

award made by the learned Arbitrator.

23. For the aforesaid reasons the award made by the learned Arbitrator Mr. N. K. Singhal, dated 01.05.1999 is made Rule of the court subject to

the modification made as aforesaid in relation to the award of interest under Claim No. 14. Parties are left to bear their respective costs.