Mohanlal Harbanslal Bhayana and Compny Vs Union of India (UOI)

Court: Delhi High Court

Date of Decision: March 30, 2012

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 34
Contract Act, 1872 â€" Section 73, 74

Citation: (2012) 2 ARBLR 91

Hon'ble Judges: A.K. Sikri, Acting C.J.; Rajiv Sahai Endlaw, J

Bench: Division Bench

Advocate: Priya Kumar, for the Appellant; Sachin Dutta (CGSC) with Gayatri Verma, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Sikri, ACJ

1. The appellant herein was awarded a contract by the respondent-Union of India. Some disputes arose in the execution of the said contract as

according to the appellant, certain claims and amounts allegedly due to the appellant were not honored by the respondent. As per the appellant, the

contract awarded was for construction of Doordarshan Bhawan, Phase II at Mandi House, New Delhi including superstructure, internal and

external water supply and plumbing work which was to be completed within 18 months, i.e. by 06.10.1996. However due to the omission and

failure on the part of the respondent, the work could not be completed within the stipulated period and since it was prolonged, the appellant

became entitled to claim extra escalation of 40% over and above the quoted rates. The appellant thus made a claim of Rs. 27,00,213 on this basis.

Since there was an arbitration clause in the contract entered into between the parties, Sh. O.P. Goel was appointed as the sole arbitrator who

rendered his award allowing a claim of Rs. 4,15,026 to the appellant as extra payment on account of increase in price of work done after the

stipulated date. The respondent-Union of India was not satisfied with this award which led to filing of petition u/s 34 of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as "the Act"). According to the respondent, Clause 10(CC) of the General Conditions of Contract

("GCC") provided for escalation and no extra claim over and above the said Clause 10(CC) could be entertained. It was thus submitted by the

respondent that by entertaining and awarding the claim, the learned arbitrator went beyond the aforesaid contractual stipulation which he was not

empowered to do.

2. Petition u/s 34 of the Act has been allowed by the learned Single Judge accepting the aforesaid plea of the respondent herein thereby setting

aside the impugned award of the arbitrator. The present intra-court appeal is preferred disputing the validity of the aforesaid decision rendered by

the learned Single Judge. Before we take note of and examine the grievances of the appellant, it would be worthwhile to find out the reasons which

prevailed with the learned Single Judge in arriving at the aforesaid conclusion. A perusal of the impugned order indicates that Clause 10(CC) of

GCC provides for claim of escalation and, therefore, any escalation claimed by the contractor has to be given within the parameters and four

corners of the said provision. The arbitrator was not permitted to go beyond the said terms. The learned Single Judge referred to the judgment of

the Division Bench of this court wherein it was held that the arbitrator had misconducted himself by not adhering to the provisions of Clause

10(CC) of GCC. This judgment of the Division Bench is taken note of in the following manner:

In this connection a Division Bench of this court in the case of Delhi Development Authority vs. K.C. Goyal & Co., 2001 (II) AD (Delhi) 116

would indeed set at rest controversy that is being raised. In the said case, K.C. Goyal & Co. had been awarded a contract by the Delhi

Development Authority for development of land at Rohini. The dispute arose and the matter was referred to the arbitrator. The Delhi Development

Authority contended that the arbitrator had misconducted himself by not adhering to the provisions of the contract, namely Clause 10(CC) and

was going beyond the terms of the contract. The Division Bench upheld the contention and relied upon the earlier decision of this court in the case

of Delhi Development Authority Vs. U. Kashyap, In paragraph 13, the conclusion was drawn in this regard and reads:

13. Since the present case is squarely covered by the ratio of Associated Engineering Company case which was applied to by the Division Bench

of this court in DDA vs. U. Kashyap (supra) interpreting Clause 10(CC) itself, following this judgment, irresistible conclusion is that the award

rendered by the arbitrator in respect of Claim No. 9 was erroneous and the arbitrator committed legal misconduct by going beyond the provisions

of Clause 10 (CC). The award of the arbitrator and the impugned judgment and decree to this extent, therefore, have to be set aside

3. Questioning the aforesaid reasoning, learned counsel for the appellant submitted that the claim of the appellant was de hors the provisions of

Clause 10(CC) of the GCC. It was based on the breach of contract committed by the respondent which breach had been established and,

therefore, the claim was preferred on the losses suffered due to the said breach which was permissible as per Section 73 of the Indian Contract

Act, 1872. It was argued that since the contract was prolonged due to the lapses on the part of the respondent and in the meantime there was

revision of taxes by the government leading to increase in price of material, the appellant had duly intimated the respondent vide letter dated

22.07.1996 about this increase, Thereafter, notice dated 04.10.1996 was served upon the respondent clearly stating that the appellant would be

charging 40% extra over and above the quoted rates of work if the work was to be executed after the stipulated date, i.e. 06.10.1996. There was

no dispute about the receipt of this notice by the respondent. After the receipt of this notice, the respondent not only permitted the appellant to

continue with the work but also granted extension of contract without the levy of compensation/penalty. It was argued that escalation which was

permissible as per Clause 10(CC) of GCC was paid on 31.03.1999 and the escalation demanded by the appellant, in this backdrop, was over

and above the said escalation which was permissible u/s 73 of the Indian Contract Act, 1872. In support of his submission, learned counsel for the

appellant pointed out the following findings arrived at by the arbitrator:

1. Even though some areas would have been made available to appellant, they could not have effectively proceeded with the work as per planning.

2. Extension of contract was given without invoking the clause of compensation. From the facts coming out of correspondence, it becomes clear

that there were hindrances in the progress of work which were caused by the UOI and were beyond the control of the appellant.

3. Contemporaneous letters of appellant/claimant bringing out difficulties and defaults being caused by the UOI were either not replied or were

replied in a cryptic manner.

4. Appellant/claimant are not responsible for the delay and the UOI/respondent are responsible for the delay caused in the work necessitating

extension of time beyond the stipulated date of compensation. It is thus clear that there has been a breach of contract and the UOI/respondent are

responsible for this breach.

5. Once there was delay caused by UOI, appellant/claimant had the option of either avoiding the contract or asking for extra payment over and

above contractual rates. The appellant had given a notice that they would be charging 40% extra over and above the quoted rates. The notice was

given before expiry of the stipulated completion time of the contract. The UOI had given a non-committal reply to the notice and had not rejected

the demand of the appellant.

6. The contractual provision of escalation will be applicable during the period of the contract and for extension for a short period caused without

breach of contract.

7. When 70% of the work is done beyond the stipulated period of the contract and a contract of 18 months is extended to beyond 5 years, it

could not be the intention of the contract to apply the escalation formula in such a situation.

8. The contractor''s notice for charging higher rates had been taken due note of by the respondent/UOI and they should have taken action to either

ask the contractor to stop the work or for negotiations with him to settle his rates or to make him agree to work on the same rates as per the

contract. Therefore, it is not open to the respondent/UOI to now dispute payment of higher rates after having received the notice and permitted

appellant to continue to execute the work for another 4 years.

4. It was further submitted that the calculations given by the appellant were not accepted by the arbitrator on the ground that they were not

supported or authenticated or justified to the satisfaction of the learned arbitrator. In these circumstances, the arbitrator adopted the cost indices

issued by CPWD and on that basis, worked out the compensation thereby granting only a sum of Rs. 4,15/026 as against Rs. 27,00,213 claimed

by the appellant which was quite reasonable. He also relied upon the following judgments in support of his aforesaid plea:

(i) Delhi Development Authority vs. Narain Das R. Israni, 2008(1) Arb. LR 58 (Del.) (DB)-In this case, the Division Bench held that award of

compensation on account of factors other than those covered by Clause 10(CC) did not suffer from any infirmity which aspect was discussed in

the following manner (at pages 66 and 67 of Arb. LR):

12. A plain reading of the above would show that the same deals with a situation where there is an increase in the prices of materials and stores

and wages of the labour required for execution of the work. The clause entitles the contractor to compensation for such increase in terms of the

formula enumerated thereunder. Such escalation shall be available only for the work done during the stipulated period of contract including the

period during which the contract is validly extended under provisions of Clause 5 of the contract. There is no gainsaying that the amount of

compensation payable under Clause 10(CC) is limited to the increase in the prices of materials and stores and/or wages of labour required for

execution of the work. The clause does not either forbid the contractor from making a claim nor does the same provide for any formula or

mechanism for determination of compensation on account of factors other than those that are specifically mentioned in the clause. This would

necessarily mean that if in addition to increase in the prices of materials and stores and wages of labour required for execution of the work, the

contractor suffers any damages on any other account as for instance on account of idle plants and machinery, scaffolding, etc. or on account of

blocked capital resulting in loss of profit or staff either posted on the work site or otherwise, he can make a suitable claim for payment on that

account. Any such claim arising out of a breach of the agreement executed between the parties can be examined and awarded by the arbitrator

depending on the evidence that the contractor may adduce to prove any such loss. We are supported in that view by the decision of this court in

Delhi Development Authority vs. S.S. Jetley, 2001(1) Arb. LR 289 (Del.) (DB). That was also a case where the contractor had made two claims,

one for payment of sums under Clause 10(CC) of the agreement and the other on account of compensation for idle labour, staff, machinery,

centering, shuttering, etc. during the extended period of work. The arbitrator had awarded the said claim which the court found to be legally

permissible under Sections 73 and 74 of the Contract Act which entitle the aggrieved party to claim damages for losses suffered due to a breach of

the contract by the opposite party. The relevant portion of the decision in Jetley"s case is as under (para 8 of Arb. LR):

It was the case of the respondent that because of prolongation of the contract due to the fault on the part of the appellant, the respondent was

made to incur the expenditure on idle labour, staff, machinery centering, shuttering and other ancillary requirements like electricity, water,

petroleum, etc. It was the case of the respondent that it was necessary for the respondent to keep regular establishment including graduate engineer

at site till the work is completed as required under Clause 36 of the agreement. The arbitrator found that the respondent had in fact incurred

expenditure on the aforesaid grounds and awarded the claim @ 5,000 per month for the period of delay which was 44 months and on this basis a

sum of Rs. 2,20,000 was awarded. It was clear, therefore, that Claim No. 17 was for damages on account of prolongation of contract inasmuch

as respondent was made to incur unnecessary expenditure due to the fault of the appellant in prolonging the contract. This claim is, therefore,

maintainable as per Sections 73 and 74 of the Contract Act which gave entitlement to the respondent to claim damages/loss suffered due to breach

of contract by the appellant.

(ii) K.N. Sathyapalan (Dead) by LRs. Vs. State of Kerala and Another, wherein the claim was found to be justified under the provisions of the

Indian Contract Act, 1872 de hors the contractual clause. Under the similar circumstances, namely, where the cost has escalated because the

contract spilled over beyond the original time stipulated in the contract, the court laid down the following principle (paras 33 to 35, page 761 of

SCACTC=pages 282-283 of Arb. LR):

19. The question which we are called upon to answer in the instant appeal is whether in the absence of any price escalation clause in the original

agreement and a specific prohibition to the contrary in the supplemental agreement, the appellant could have made any claim on account of

escalation of costs and whether the arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court.

20. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to

fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the

authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations.

That is the distinguishing feature of cases of this nature and Alopi Parshad''s case and also Patel Engg.''s case. As was pointed out by Mr. Dave,

the said principle was recognised by this court in P.M. Paul''s case where a reference was made to a retired judge of this court to fix responsibility

for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned judge, this court gave its

approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the

extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this court in T.P. George''s case.

5. Learned counsel for the respondent, on the other hand, submitted that Clause 10(CC) of GCC clearly covered the claim of escalation submitted

by the appellant which was even accepted in the award by the arbitrator. He referred to certain discussions in this behalf in the impugned award.

He thus submitted that in view of the specific provision in the contract, no additional claim could be made under the provisions of Section 73 of the

Indian Contract Act. It was more so, argued the learned counsel, when admittedly actual loss was not proved. Learned counsel for the respondent

thus argued that case was not covered by the judgments cited by the counsel for the appellant and instead ratio of the following judgments would

apply in the instant case:

(i) Bharat Coking Coal Ltd. Vs. Annapurna Construction,

14. The question is as to whether the claim of the contractor is de hors the rules or not was matter which fell for consideration before the arbitrator.

He was bound to consider the same. The jurisdiction of the arbitrator in such a matter must be held to be confined to the four corners of the

contract. He could not have ignored an important clause in the agreement; although it may be open to the arbitrator to arrive at a finding on the

materials on records that the claimant''s claim for additional work was otherwise justified.

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17. We are furthermore concerned with Claim Item Nos. 7 and 11 which are under the headings of ''Losses Due to Prolongation of Work'' and

''Material Escalation''. It is not in dispute that a secured advance of 95% of the cost of materials was given in terms of the contract which is to the

following effect:

Secured advance will be paid @ 95% of the cost of materials as a special case to get the work completed within 4 (four) months as per latest

price list of BCCL (copy enclosed), subject to submissions of indemnity bond on non-judicial stamp paper of required value in the approved pro

forma of BCCL and also insurance against fire, theft and damages, etc. The secured advance will be paid only on the items on which it was

payable in BCCL. The secured advance thus paid, will be recovered in five equal instalments from the subsequent running account bills or on the

consumption of materials whichever is earlier.

18. The appellant does not dispute the same. It is also not in dispute that the appellant has not charged any interest in respect of the said advance.

It is further not in dispute that cement (c) Rs. 51 per bag, mild steel rounds @ Rs. 5,460 per metric tonne and for steel @ Rs. 5,810 per metric

tonne were supplied by the appellant. However, the claim relating to material escalation was confined to six articles which were allegedly not

supplied by the appellant, namely, bricks, AC sheets, angles, doors, frames and shutters, etc.

19. So far as these items are concerned, in our opinion, the learned sole arbitrator should have taken into consideration the relevant provisions

contained in the agreement as also the correspondences passed between the parties. The question as to whether the work could not be completed

within the period of four months or the extension was sought for on one condition or the other was justifiable or not, which are relevant facts which

were required to be taken into consideration by the arbitrator.

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21. In Associated Engineering Co. Vs. Government of Andhra Pradesh and another, this court clearly held that the arbitrators cannot travel

beyond the parameters of the contract. In Sudarsan Trading Co. Vs. Government of Kerala and Another, this court has observed that an award

may be remitted or set aside on the ground that the arbitrator in making it had exceeded his jurisdiction and evidence of matters not appearing on

the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is

something which has been determined outside the award, whatever might be said about it in the award by the arbitrator. This court further

observed that an arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(ii) Ramachandra Reddy and Co. Vs. State of Andhra Pradesh and Others,

7. In the case of S. Harcharan Singh vs. Union of India (supra) on which Mr. Rao had strongly relied upon, this court had quoted Clause 12 of the

agreement in paragraph 8 of the judgment and referring to the standard form of contract of the Central Public Works Department, specifically

permitting for a limit of variation called ""deviation limit"" up to a maximum of 20 per cent, it was held that the contractor has to carry out the work at

the rate stipulated in the contract up to such limit but for work in excess of that limit he has to be paid at the rates to be determined in accordance

with Clause 12A, under which the Engineer-in-charge can revise the rates, having regard to the prevailing market rates. The court also referred to

the letters of the Executive Engineers, the Superintending Engineer and the Additional Chief Engineer recommending that the additional work may

be confined to 20 per cent and for the extra quantity of additional work, he may be paid remuneration at the increased rate taking into account the

increased cost of the execution of work on account of peculiar nature of the work. We fail to understand how the aforesaid decision will be of any

assistance to the claimant in the present case, where there is no clause like Clause 12A nor is there any letter from the competent authority agreeing

to payment at a higher rate for the additional work beyond the limit of 25 per cent as provided under the GOMs No. 2289 dated 12.06.1968.

Arbitrator being a creature of the agreement, unless agreement either specifically or inferentially provides for a higher rate to be awarded for any

additional or excess work done by the contractor, it would not be permissible for the arbitrator to award for the so-called additional work at a

higher rate. In the case in hand, not only there is no letter from the competent authority, namely the Superintending Engineer that the contractor

would be paid at any higher rate for the additional excavation of rock, though the Executive Engineer had indicated that he has recommended to

the Superintending Engineer. But such recommendation of the Executive Engineer, who was not competent to decide the question of awarding a

higher rate for the excess quantity of excavation will not clothe any jurisdiction on the arbitrator to award the contractor at a higher rate nor would

it entitle the contractor to get a higher rate for the claim in question on the basis of agreement. Now coming to the very clause, upon which Mr.

Rao relied upon, we find that the said clause relates to supplemental items, which have been found essential, incidental and inevitable during the

execution of the work. The excavation of hard rock cannot be held to be a supplemental item and on the other hand, is an item of work tendered

and accepted, and as such Clause 63 will have no application to the Claim Item No. 1. Mr. Rao had also relied upon the decision of this court in

National Fertilizers vs. Puran Chand Nangia (supra), wherein this court had held that an interpretation of a particular clause of the agreement must

be such, so as to balance the rights of both parties and when a variation clause permits the employer to make variation in the work up to a

specified limit, beyond the said limit, the claimant could be paid at a higher rate. The court in the aforesaid case was examining the principle of

integrity of the contract and refused to interfere with the award merely because arbitrator had granted an escalation. In the aforesaid case, the court

was examining whether it would be permissible for it to interfere with an award which was a non-speaking one merely because the arbitrator had

awarded the claim at an escalated rate for the excess quantity of work and since the award itself was a non-speaking award, the court held that it

is not permissible to probe into the mental process of the arbitrator and then interfere with the same. Then again the question of granting a higher

rate for any extra quantity of work executed by the contractor would at all arise only when the contract provides for such escalated rate either

expressly or by implication as in the case of S. Harcharan Singh, where the competent authority had agreed for the same by correspondence. But

in the case in hand, when there is no such acceptance by the competent authority, and there is no provision in the contract, permitting such

escalated rate for the additional quantity of excavation made and in view of our rejecting the contention raised on the basis of Clause 63, the

conclusion is irresistible that the contractor will not be entitled to a higher rate for the additional excavation work and as such the High Court was

fully justified in setting aside the direction of the trial judge, remitting the Claim Item No. 1 for reconsideration and we see no infirmity with the said

direction of the High Court to be interfered with. We also find sufficient force in the submission of Mrs. Amreswari, relying upon the letters of the

competent authority, specifically intimating that the grant of extension of time will not in any way make the contractor eligible for any extra claim

due to escalation in rates of labour and materials or due to any other reasons under any circumstances and the decision of this court in Ch.

Ramalinga Rddy v. Superintending Engineer supports the aforesaid contention. In the aforesaid premises, we do not find any merits in this appeal,

requiring our interference with the impugned judgment of the High Court. The appeal fails and is dismissed but in the circumstances there will be no

order as to costs.

He also relied upon two Single Bench judgments of this court in the case of Pt. Munshi Ram & Associates (P) Ltd. vs. Delhi Development

Authority, 2006(1) Arb. LR 137 (Del.) and unreported judgment dated 18.12.2009 in CS (OS) No. 775-A/1994 titled Kamal Construction

Company vs. Delhi Development Authority and another.

6. A conjoint and harmonious reading of the judgments cited by both the parties would lead us to cull out the legal proposition to the effect that

whenever there is a provision in the contract within the parameters whereof a particular claim falls, said claim has to be adjudicated upon within the

four corners of the said contractual provision. It is for the reason that the arbitrator has to take into consideration the provision of the contract and

he cannot travel beyond the parameters of the contract. If the award is given outside the said contractual provision, it would amount to exceeding

the jurisdiction by the arbitrator which is not permitted. A distinction has to be maintained between an error within the jurisdiction and an error in

excess of jurisdiction. On the other hand, if the claim does not fall within the stipulated contractual provision but is a claim for loss suffered which

can be granted under the provisions of Sections 73 and 74 of the Indian Contract Act, it would be permissible for the arbitrator to award such a

claim. Keeping in view the aforesaid position in law, we have to examine as to whether Clause 10(CC) of the GCC apply to the claim as preferred

by the claimant or such a claim could be entertained under the provisions of Section 73 of the Indian Contract Act notwithstanding existence of

Clause 10(CC) of the GCC. In order to appreciate this, we may first reproduce Clause 10(CC). It reads as under:

Clause 10(CC)--If the prices of materials not being materials supplied or services rendered at fixed price by the department in accordance with

Clauses 10 and 34 hereof and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such

increase as per provisions detailed below and the amount of the contractor shall accordingly be varied subject to the condition that such

compensation for escalation in prices shall be available only for work done during the stipulated period of the contract including such period for

which the contract is validly extended under the provisions of Clause 5 of the contract without any actions under Clause 2 and also subject to the

condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less. Such

compensation for escalation in the prices of materials and labour when due, shall be worked out based on the following provisions:

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(6) The compensation for escalation for labour shall be worked out as per the formula given below:

(ii) VL= WX Y/100-x X (L1 - L1Ã¯Â¿Â½)/L1Ã¯Â¿Â½

VL= Variation in labour cost, i.e. increase or decrease in the amount in rupees to be paid or received.

W = Value of work done, worked out indicated in sub-para 2 above.

Y = Component of labour expressed as per cent of the total value of work equal to 25%.

7. This clause clearly takes into account escalation in the prices of material as well as compensation for escalation for labour and provides the

formula on the basis of which escalation in the prices of material and/or labour is to be worked out. Therefore, if the claim for escalation preferred

by the contractor relates to material or labour, it would be covered by Clause 10(CC) of the GCC and the contractor is entitled to get the claim as

per the said provision. In the present case, the claim was admittedly on account of escalation in the prices of material and, therefore, would be

covered by Clause 10(CC) of the GCC. Identical situation arose in the case of Pt. Munshi Ram & Associates (P) Ltd. and the learned Single

Judge held that the claim awarded as per the provisions of Clause 10(CC) of the GCC was justified. That was also a case where the contract

prolonged beyond the stipulated date and the contractor had given a notice to the department to charge 40% extra over and above the quoted

rates. However, the court held that such a claim would be permissible only in accordance with Clause 10(CC) of the GCC. The judgments cited

by-learned counsel for the appellant have no applicability. In Narain Das R. Israni Claim No. 22 was for compensation on account of factors other

than covered by Clause 10(CC) of the GCC and it was for this reason that the court held that award given did not suffer from any infirmity.

Likewise, in K.N. Sathyapalan there was no provision at all in the contract, for any price escalation in the original agreement and by supplemental

agreement, it was provided that no claim for escalation would be permissible. The question was examined from that angle and it was held that such

a provision prohibiting grant of compensation would not apply in the event when one of the parties to the contract is unable to fulfil its obligation

under the contract and the compensation was permissible under the law, i.e. the Indian Contract Act. We, therefore, do not find any infirmity in the

impugned judgment and thus dismiss this appeal.