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(2009) 08 DEL CK 0428

Delhi High Court

Case No: CS (OS) 2404A of 1995

Sunder Lal Khatri and Sons		APPELLANT
	Vs	
DDA		RESPONDENT

Date of Decision: Aug. 18, 2009

Acts Referred:

- Arbitration Act, 1940 - Section 18, 19, 37(3), 8(2)

Hon'ble Judges: S.N. Dhingra, J

Bench: Single Bench

Advocate: Harish Malhotra and Rajender Aggarwal, for the Appellant; Bhupesh Narula, for the Respondent

Judgement

Shiv Narayan Dhingra, J.
By this order, I shall dispose of the objections raised by DDA against an award dated 28th September 1995 passed by the learned Arbitrator. The objections have been raised claim-wise, so I shall be dealing with these objections claim-wise.

2. Claim No. 1: The learned arbitrator has awarded a sum of Rs. 4,75,367.75 in favour of petitioner holding that the amount on the basis of a final bill of Rs. 9,21,362/- of the work done prepared by the contractor minus the recoveries to be made by petitioner. The recoveries for the stipulated material to be done by DDA was held as Rs. 3,25,319.25 and for outstanding secured advance as Rs. 1,20,675/-, thus DDA had to recover Rs. 4,45,994.25. The balance amount payable to the claimant has been held to be Rs. 4,75,367.75.

3. A perusal of award shows that claim No. 1 has been inflated in a very strange manner by claimant after the appointment of present arbitrator in the year 1992. The claimant filed its detailed statement of claim on 5th July 1985. The contract between the parties was terminated in July 1984. Thereafter, claimant had invoked arbitration clause and an arbitrator was appointed. After appointment of arbitrator, claimant gave details of its claim as under:

Claim No. 1:- Rs. 4 lakhs on account of work done not/short paid.

The claimants claim a sum of Rs. 4 lac on account of work executed but not/short paid. The said amount as claimed is on account of difference in part rates paid and full rate payable for the work carried out and accounted for up to last R/bill. Resides this, the amount claimed also includes the amount due on account of work executed after the last R/bill paid. In addition, the amount claimed includes the amount not/short paid in relation to various operations executed at site by way of extra/substituted items. The respondents have not correctly applied the provision of agreement for determining the rates of few extra/substituted items. Fro some of the operations, the claimants have not been paid for at all though execute at site. There is no justification with the respondents in not making payment to the claimants for the work executed by them at site which is otherwise due in terms of the contract. Any deduction/ reduction/ recoveries made in the final bill which are otherwise unjustified, shall also remain a matter of dispute. There being no justification with the respondents in not releasing the amount due to the claimants, it is prayed that the learned arbitrator maybe pleased to allow the amount due in favour of the claimants.

The respondents are required to file before the learned Arbitrator with a copy to the claimants, the copy of final bill or the work executed by the claimants. The claimants reserve their right to make further submissions in this regard on receipt of copy of final bill.

4. No amended claim petition was filed by the claimant before the arbitrator. However, perusal of award would show that the claim No. 1 of Rs. 4 lac filed by the claimant was modified on a request sent for a claim of Rs. 6,25,000/- by the claimant to the Engineer Member who referred the modified claim to the arbitrator vide letter dated 24th March 1992. The present arbitrator was appointed on 17th March 1992 and the previous arbitrator was appointed in March 1985. From 1985 till 1992, the contractor had not asked for any modification of his claim, but suddenly the claim made by the contractor started swelling. There are no reasons assigned anywhere either in the award or in the pleadings or in the statement of claim as to on what basis, the initial claim of Rs. 4 lac stood modified to Rs. 6,25,000/-.

5. The learned arbitrator during discussions on claim No. 1 observed that the contractor during pendency of proceedings before him prepared a final bill of Rs. 9,21,362/-. This observation is also beyond comprehension. The claim of Rs. 4 lac was made by the contractor against short payment/ non- payment of work done by him, after about one year of the termination of the contract when the contractor very well knew as to how much work he had done; how much payment he had received; what was the balance amount recoverable. From 1985 till 1992, the amount of Rs. 4 lac stated by him in the statement of claim remain unchanged. This amount swelled to Rs. 9,21,362/- suddenly after about eight years of termination of contract. The learned Arbitrator did not take into account the fact that he was not

supposed to consider time-barred claim. It was a case of termination of contract and a dispute was raised by the contractor himself for his claims. There cannot be a doubt that the contractor was knowing the amount of work done by him, the amount of money recovered by him. The limitation in this case, therefore, commenced from the date of termination of contract i.e. July, 1984 and after July 1987, all claims of the contractor raised by it before the arbitrator would have been barred by limitation. Merely because the engineer referred a claim does not mean that the arbitrator gets jurisdiction to entertain time-barred claim. In J.C. Budhraja Vs. Chairman, Orissa Mining Corporation Ltd. and Another, , the Supreme Court had observed:

18. The learned Counsel for the appellant submitted that the limitation would begun to run from the date on which a difference arose between the parties, and in this case the difference arose only when OMC refused to comply with the notice dated 4.6.1980 seeking reference to arbitration. We are afraid, the contention is without merit. The appellant is obviously confusing the limitation for a petition u/s 8(2) of the Arbitration Act, 1940 with the limitation for the claim itself. The limitation for a suit is calculated as on the date of filing of the suit. In the case of arbitration, limitation for the claim is to be calculated on the date on which the arbitration is deemed to have commenced. Section 37(3) of the Act provides that for the purpose of Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4.6.1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4.6.1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition u/s 8(2) of the Act. Insofar as a petition u/s 8(2), the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition u/s 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, , Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, and Utkal Commercial Corporation Vs. Central Coal Fields Ltd., also make this position clear.

21. The arbitrator committed an error apparent on the face of the record and a legal misconduct in holding that the entire claim was within time. His assumption that if the application filed by the contractor in 1980 u/s 8(2) of Arbitration Act for appointment of an Arbitrator was in time, all claims made in the claim statement filed before the Arbitrator appointed in such proceeding u/s 8(2) are also in time, is patently erroneous and is an error apparent on the face of the record. The reasoning of the arbitrator that on account of the formation of the Committee by OMC to scrutinize the pending claims in pursuance of the OMC''s letter dated 28.10.1978, and the payment of Rs. 3,50,000/- on 4.3.1980 in pursuance of the

Committee giving its final report on 7.12.1979, every claim of the contract including new claims which were made for the first time in the claim statement filed in 1986 (as contrasted with ''pending claims'' considered by OMC), are not barred by limitation, is also an error apparent in the face of the award. u/s 18 an acknowledgement in writing extends the limitation. u/s 19 a payment made on account of a debt, enables a fresh period of limitation being computed. Therefore, the letter of OMC dated 28.10.1978 and the payment of Rs. 3,50,000/- by OMC, would result in a fresh period of limitation being computed only in regard to the ''existing debt'' in respect of which acknowledgment and payment was made. Admittedly, as at that time, the claim of the contractor was only for a sum of Rs. 50,15,820. Therefore, the letter dated 28.10.1978 and payment on 4.3.1980 extended the limitation only in respect of the claims which were part of the said claim of Rs. 50,15,820. Therefore, the fresh claims of Rs. 67,64,488/- (out of the total claim of Rs. 95,96,616) is barred by limitation and the award made in that behalf is liable to be set aside Consequently, we hold that only that part of the claim before the Arbitrator which was part of the claim of Rs. 5015,820/- made by the contractor, that was existing or pending as on 28.10.1978 and 4.3.1980, namely Rs. 28,32,128 (out of Rs. 95,96,616) could have been considered by the Arbitrator.

6. It is obvious from the law laid down by the Supreme Court that the limitation would begin to run from the date of cause of action and an arbitrator has to consider if the claims preferred before him were within the period of limitation or not. The period of limitation for filing a petition for arbitration has nothing to do with the period of limitation of the claim made.

7. In case where the contract is terminated by one party because of defaults of the other party, the cause of action is the date of termination of contract and limitation starts from that day and the aggrieved party is supposed to make the claims within three years from the date of termination of contract. In the present case, the contract was terminated on 31st July 1984. The claims could have been made by contractor only upto 31st July 1987. The contractor did file a statement of claims before the arbitrator G.R. Hingorani on 5th July 1985 with supporting documents. All claims referred to the arbitrator subsequent to July, 1987, whether by the petitioner or counterclaim by the respondent, would be barred by limitation.

8. Looking at the initial claim of petitioner being Rs. 4 lac and the conclusion drawn by the arbitrator that out of this amount a sum of more than Rs. 4,44,994.25 was to be adjusted, the claim of the claimant should have been in the negative to the tune of Rs. 75,367.75. The award made by the arbitrator allowing time barred claim is patently erroneous and the error is apparent on the face of it, as arbitrator himself records that the amended (inflated) claim was sent to him after about 8 years of the termination of contract. I, therefore, set aside the amount awarded by the arbitrator under claim No. 1.

9. Claim No. 2: Claim No. 2 was towards refund of security deposit. The learned arbitrator has allowed the refund of the security amount. I find no reason to interfere with this part of award.

10. Claim No. 3: Claim No. 3 was made by the petitioner/claimant for a sum of Rs. 40,000/- under Clause 10C towards rise in wages or labour. The learned arbitrator observed that the delay was attributable to the respondent and the contractor was not at fault as admitted by the respondent vide R-49. The learned arbitrator, therefore, allowed claim of Rs. 29,624/- in favour of claimant/ petitioner.

11. Clause 10C of the agreement reads as under: Clause 10C. If during the progress of the works, the price of any material incorporated in the works, (not being a material supplied from the Engineer-in-Charges stores in accordance with Clause 10 hereof) and/or wages of labour increases as a direct result of the coming into force of any CS(OS) 4405/1992 Verma Construction Company v. DDA Page 5 Of 13 fresh law, or statutory rule or order (but not due to any changes in sales tax) and such increase exceed ten percent of the price and/or wages prevailing at the time of receipt of the tender for the work, and contractor thereupon necessarily and properly pays in respect of the material (incorporated in the work) such increased price and/or in respect of labour engaged on the execution of the work such increased wags, then the amount of the contact shall accordingly be varied provided always that any increase so payable is not, in the opinion of the Superintending Engineer (whose decision shall be final and binding) attributable to delay in the execution of the contract within the control of the contactor. Provided, however, no reimbursements shall be made if the increase is not more than 10% of the said prices/ wages and if so the reimbursements shall be made only on the excess over 10% of the said prices/ wages and if so the reimbursements shall be made only on the excess over 10% and provided further that any such increase shall not be payable if such increased has become operative after the contact or extended date of completion of the work in question. If during the progress of the works, the price of any material incorporated in the works [not being a material supplied from the Engineer-in-Charges stores in accordance with Clause 10 hereof] and/or wages of labour is decreased as a direct result of the coming into force of any fresh law or statutory rule or order [but not due to any changes in sales tax] and such decrease exceeds ten percent of the prices and/or wages prevailing at the time of receipt of the tender for the works. Delhi Development Authority shall in respect of materials incorporated in the work [not being materials supplied from the Engineer-in-in charges stores in accordance with Clause 10 hereof] and/or labour engaged on the execution of the work after the date of coming into force of such law statutory rule or order be entitled to deduct from the dues of the contractor such amount as shall be equivalent of difference between the prices of materials and/or wags as they prevailed at the time of receipt of tender for the work minus ten percent thereof and the prices of materials and /or wages of labour on the coming into force of such law, statutory rule or order. The contractor shall for the purpose of this condition keep

such books of account and other documents as are necessary to show the amount of any increase claimed or reduction available and shall allow inspection of the same by a duly authorized representative of Delhi Development Authority and further shall, at the request of the Engineer-in-Charge furnish, verified in such a manner as the Engineer in-charge may require any document to kept and such other information as Engineer- in-charge may require. The contractor shall, within a reasonable time of his becoming aware of any alteration in the prices of any such materials and/or wages of labour, give notice thereof to the Engineer-in-Charge, stating that the same is given in pursuant to this condition together with all information relating thereto which he may be in a position to supply.

12. A perusal of Clause 10C makes it abundantly clear that claim under Clause 10C lies only if during the progress of work, price of any material (not being a material supplied from the Engineer-in-charge store) or wages of labour increases because of coming into force of any fresh law, statutory rule or order and such increase exceeds 10% of the price /wages prevailing at the time of the receipt of tender. The contractor can claim reimbursement of the increase in price and labour wages only if the increase is more than 10% and only to the extent it was in excess of 10% and he serves a notice on DDA during progress of work. Such reimbursement of the increased prices/labour is to be made only if it is approved by the Superintending Engineering. A similar provision is there in Clause 10C in respect of reduction in price and reduction in wages. Clause 10C also provides that in order to claim such an increase, the contractor will have to keep books of accounts showing payment of increased wages to labour and increased price for goods. Thus, an enhancement under Clause 10C can be allowed only if the conditions, as set out in Clause 10C, are satisfied. The learned arbitrator was not at liberty to award any arbitrary amount under Clause 10C. Only that amount could be awarded under Clause 10C as permitted under it and for which books of accounts had been maintained by the contractor and it is shown that there was statutory increase either in the labour rates or in the rate of materials. No presumption could be drawn by the learned Arbitrator that because of the contract overrunning, there was necessarily going to be a price rise and necessarily going to be a wage rise. Any such award where a departure from the contractual clauses is made, is liable to be set aside on this ground. A departure from the contract amounts to manifest disregard of the authority by the arbitrator. The arbitrator, being the prisoner of the contract, is bound to remain within the four corners of the contract.

13. A perusal of reply filed by respondent/DDA shows that DDA had sought refund of the amount paid by it on ad hoc basis to the claimant. The claimant under this head could have raised the claim only in terms of Clause 10C. The arbitrator could not have allowed any amount contrary to the contract. Clause 10C is not meant for enrichment of the contractor. It is meant to see that the labour gets its dues and proper account is maintained of the payment made of wages to the labour, whenever there is an enhancement in the wages of labour. The learned arbitrator is

supposed to grant this claim only on the basis of wage register maintained by the claimant after ensuring that enhancement of wages were duly paid to the labour. Mere issuance of notification by the Government is no proof of the fact that wages were paid to the labour as per notification. A claim under Clause 10C can be allowed by the arbitrator only and if only the conditions specified therein are satisfied. It cannot be allowed either on presumption or on whims and fancies. I, therefore, find that the award under this claim is contrary to the terms of the contract and is liable to be set aside. It is ordered accordingly.

14. Claim No. 4: The claimant raised a claim of Rs. 70,000/- under Clause 10C on account of rise in price of bricks. The learned arbitrator awarded a sum of Rs. 64,937/- on the ground that he had gone through the calculations and the calculations had not been disputed by respondent. Respondent in reply to claim No. 4 stated that during the contract a provisional payment was made to the contractor under Clause 10C with an undertaking that in case there was delay in execution of work on the part of contractor, he would refund the same to DDA. Rs. 79,111/- was paid by DDA to the contractor/claimant on provisional basis. Since this amount was paid by DDA, DDA could not have asked for recovery of this amount but any additional amount could have been allowed by the learned arbitrator only if the conditions of Clause 10C as stated above were satisfied. In absence of satisfaction of conditions under Clause 10C i.e. the difference being more than 10% of the initial value, award under claim 4 is liable to be set aside. It is hereby set aside.

15. Claim No. 6: The claim No. 6 was filed by the claimant/ contractor on 5th July 1985 for Rs. 1 lac. The learned arbitrator has awarded a sum of Rs. 47,514.50 holding that in view of the serious contentions of respondent /DDA, he allows a sum of Rs. 47,514.50 being 50% of the amount claimed. Although I find that the learned arbitrator has given no reasons as to why he was allowing 50% of the claim and not 40% or 30% or 60%, however, I do not disturb the award under this claim.

16. Claim No. 7: Claim No. 7 was made by the petitioner / claimant for Rs. 15 lac on account of damages for alleged failure on the part of DDA/Department in making available the site free of hindrance, delay in handing over required drawings, decisions in time and not supplying material in time. The contractor claimed this amount on the ground of infructuous expenditure on account of idle central shuttering and establishment. The learned arbitrator awarded a sum of Rs. 5,00,600/- to the claimant observing that whenever there was delay in completing the work of the contract, the contractor was bound to suffer losses on account of idle tool and plant, infructous overheads, losses on account of escalation, loss of profitability etc.

The learned arbitrator held that the claimant was entitled to claim a sum of Rs. 3,250/- per month for a period of 27 months on account of non productivity of tools and plant. Thus, he awarded Rs. 87,750/- under the heads of idle tools and plants. He awarded 25% of the salary amount claimed for the delayed period amounting to

Rs. 1,22,850/- to the contractor on the ground that claimant had to deploy one engineer, one store keeper and a chowkidar and mason at the work site and since the work got delayed, he had to incur extra expenditure on them. He awarded a sum of Rs. 1,90,000/- on account of loss suffered by the claimant/ contractor due to price rise and awarded another sum of Rs. 1 lac as costs on tools and plant left by the contractor at site but not returned to the contractor. This claim has been assailed by DDA on the ground that grant of claim was contrary to the terms and conditions of the contract.

17. It is worthwhile to note that delay in this case was due to a stay order obtained in respect of the site of construction from the Court and due to site having bushes etc requiring leveling and dressing before the work could be started. No doubt para 2(a) of NIT states that, The site for work being available but this does not show that the site is absolutely ready for work and there being no hindrance. It is for this reason that the tender document under Specification & Conditions provides as under:

1. The contractor must get acquainted with the proposed site for the works and study specifications and conditions carefully before tendering. The work shall be executed as per programme approved by the Engineer-in-Charge. If part of site is not available for any reason or there is some un-avoidable delay in supply of materials stipulated by the Department, the programme of construction shall be modified accordingly and the contractor shall have no claim for any extras or compensation on this account.

18. The plea of claimant is that words If part of site is not available for any reason imply that there must be justifiable reasons. The reading of this clause only shows that for any reason. means for any reasons whatsoever and not that there must be some justifiable reasons. It is clear from above clause that in case the work got prolonged due to non-availability of site or due to any other reason the work of construction was to be re-programmed, modified (by extension of time for completing the work) No claim for any extra amount or compensation could be made by the contractor under such circumstances unless contract provided that in case of extension of time, the contractor would be entitled for additional amounts.

19. A perusal of award in respect of claim No. 7 would show that learned arbitrator observed that the general conditions and specifications as relied upon by the respondent DDA would not come to the rescue of DDA because it was not a case of non supply of material but the delay was on account of non supply of drawings and decision. However, this observation of the learned arbitrator is contradictory to the contentions in claim and the observations made by learned arbitrator at page 13 of award. The claimant had contended before the arbitrator that there was delay due to non issuance of drawings, non supply of cement, non availability of site, delay in taking decisions and non-payment of dues in time. Non issuance of drawings and decision was only one of the factors enumerated. The other factors for delay as

enumerated by the claimant/ contractor were non availability of site due to presence of barracks, non issuance of cement, non-payment of dues etc. The aforesaid clauses of the contract specifically take care of the non issuance of cement, steel and other material and non availability of site. It is specifically provided that in case of any delay in providing site or material, the programme of construction has to be re-scheduled and the contractor would not be entitled for any damages. The damages have been awarded to the contractor considering the idleness of his machinery, engineer, supervisor and deployment of labour, chowkidar etc on the presumption that the contractor was having no other work and he was having one sole contract at that time. It is never a case that one contractor does one work at a time and till the work is over, he does not engage his employees, labour, machinery, engineer, supervisor at other sites. Whenever a contractor claims loss on account of prolongation of contract on the ground that he has not been able to fruitfully utilized his machines and men, the arbitrator cannot presume that the contractor was having only one contract and he had no other site of work where he could deploy his engineer and labour. It is also a known fact that the civil contractors do not employ labour, chowkidars and other workforce as their permanent workforce. The workforce is employed by the civil contractors for a specific work and for specific period when the work is going on. It is for this reason that the contract provides for maintenance of wage register so that the record is there that the contractor had been employing the workforce all along for which the contractor makes claim. In absence of any wage register, no presumption can be drawn that the contractor had really paid wages to the workforce as claimed or this workforce was being employed at site. No claim could have been allowed by the arbitrator in absence of record of employment of engineer, supervisor, chowkidar, etc. record more so when the contract specifically provides that the contractor would not be entitled for any damages in case the contract gets prolonged due to non supply of material or non availability of site. The arbitrators allowing 25% or 50% of the claimed amount, without giving reason for arriving at such percentage amounts to arbitrariness. In Bharat Coking Coal Ltd. Vs. L.K. Ahuja, , the Supreme Court observed as under:

Para 23. Claim No. 8 has been rejected by the arbitrator. Now we proceed to consider claim No. 9 for loss arising out of turnover due to prolongation of work. The claim made under this head is in a sum of Rs. 10 lakhs. The arbitrator rightly held that on account of escalation in wage and prices of materials compensation was obtained and, therefore, there is not much justification in asking compensation for loss of profits on account of prolongation of works. However, he came to the conclusion that a sum of Rs. 6,00,000/- would be appropriate compensation in a matter of this nature being 15% of the total profit over the amount that has been agreed to be paid. While a sum of Rs. 12,00,000/- would be the appropriate entitlement, he held that a sum of Rs. 6,00,000/- would be appropriate. He also awarded interest on the amounts payable at 15% per annum.

Para 24. Here when claim for escalation of wage bills and price for material s 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 for us to accept the proposition that in addition 15% of the total profit should be computed under the heading Loss or Proft. It is not unusual for the contractors 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 utilized the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in Sunley (B) & Co. Ltd. v. Cunard White Star Ltd. (1940) 1 KB 740 by the Court of Appeal in England. Therefore, we have no hesitation in deleting sum of Rs. 6,00,000/- awarded to the claimant.

I therefore consider that award of Rs. 5,00,600 was untenable and only an amount of Rs. 1 lac awarded by the arbitrator towards tool and plant was tenable. The award made under claim 7 is, therefore, modified and only award of Rs. 1 lac is upheld and award of Rs. 4,00,600/- is hereby set aside.

20. Under claim No. 8, the claimant, in his claim dated 5th July 1985 claimed interest @ 12% per annum both pre-suit and pendent lite on the amount fallen due. However, in 1992, contractor got a reference made for interest @ 18%. This modification was not permissible being barred by limitation. 6% additional interest would result into additional amounts being claimed in 1992 i.e. 7 years after reference. The learned arbitrator has allowed interest @ 12% pendent lite from 13th March 1985 i.e. from the date of entering the reference by previous arbitrator to 19th March 1992 till the claim of interest was modified and, he awarded interest @ 17.5% for subsequent period. I consider that awarding of interest @ 17.5% per annum was contrary to law. The contractor could not have modified the claim after a period of three years from the date of cause of action. 6% difference in rate of interest makes a lot of difference. The award of the learned arbitrator regarding interest is modified and claimant is held entitled for interest @ 12% per month from 13th March 1985 till date of payment or decree, whichever is earlier.

21. In view of my foregoing discussion, the objections of respondent/DDA in respect of claim No. 1, 3, 4; and partly in respect of claim No. 7 are allowed. The award made by the arbitrator is modified accordingly.

22. The learned arbitrator has dealt with the counter claims of respondent DDA. All the counter claims of respondent were filed beyond the period of limitation. The amended counter claim of respondent was also filed beyond the period of limitation. The arbitrator has rejected these counter claims for different reasons. I consider that these counter claims were not entertainable since they were barred by

time.

23. In view of above discussion, the award made by the arbitrator, as modified by the Court is made a rule of the Court. The petitioner would be entitled to interest from the date of decree till realization @ 8% per annum.