
(1995) 09 DEL CK 0095

In the Delhi High Court

Case No : S. No. 2847/90 Along with Suit No. 2740-A/90

Asia Foundations Construction Ltd.

APPELLANT

Vs

Oil and Natural Gas Commission

RESPONDENT

Date of Decision : 22-09-1995

Acts Referred:

Citation : (1995) 09 DEL CK 0095

Hon'ble Judges : S.D. Pandit, J

Bench : Single Bench

Advocate : Mr. L.P. Dhir and Mr. Alok Dhir, for the Appellant; Mr. B. Datta Sr. Advocate, Mr. Shashiprabhu and Mr. Amit Dhingra, for the Respondent

Judgement

S.D. Pandit, J.—For fabrication and laying of effluent disposal conduit, including concrete coating portion, protection coating and associated works on 9.10.1985. The total value of the contract work was Rs. 1,14,70,918.70 p. The work included laying of pipes between mid-sea to plaintiff's premises at Uran, having total length of 1600 mtrs. The work was to be carried on land and sea, consisting of partly submerged portion of land due to tidal waves and fully submerged land. The said work was to be completed within six months from 1.9.1985 but was actually completed about 64 weeks after the stipulated date.

2. Disputes between the parties had arisen and the matter was referred to the sole arbitration of Shri V. J. Sood. The Arbitrator passed the Award dated 27.1.1990 and awarded in all Rs. 47,18,003/- to the petitioner herein.

3. Respondent Oil and Natural Gas Commission (hereinafter referred to as "ONGC") has filed objections to the Award under Sections 30 and 33 of the Arbitration Act. It is contended that Engineers India Limited had forwarded the bills to the respondent ONGC after verification of the same and those bills were paid by the respondent to the Contractor and subsequently, disputes were first raised by the Contractor. This aspect was not at all considered by the Arbitrator.

4. It is further contended by the respondent ONGC that the Arbitrator had

misconducted himself and the Award is also not passed on a valid stamp paper. The sole Arbitrator did not take into consideration the tendered documents between the parties and has, consequently, erred in coming to a wrong decision. The Arbitrator did not take into consideration that the claim was barred in view of Clause 5.5 of the General Clauses Act and Clause 7.2 of Special Conditions of Contract documents and that amounts to an error of law. The sole Arbitrator has not at all given appropriate interpretation to the contract documents and the material on record. Therefore, the Award deserves to be set aside.

5. It is further contended by the respondent that as there was fulfillment of the contract, respondent ONGC was entitled to levy the penalty as per the terms of the contract and Arbitrator was not justified in reducing the said penalty. Thus, it is contended by the respondent that the Award passed by the Arbitrator should not be accepted by this Court and no decree in terms of the same should be passed.

6. It is also contended on behalf of the contractor that the Court should Award interest to the Contractor from the date of the Award till the date of realisation. The said claim of the Contractor is also opposed by the respondent ONGC.

7. The Arbitrator had filed an application Along with the Award in Court on 10.8.1990 before this suit was filed by the Contractor. That application of the Arbitrator is given Suit No. 2740A/90. It is tagged with this Suit and both the suits are consolidated.

8. In view of the pleadings my learned predecessor had settled the issues. Those issues and my findings thereon for the reasons hereinafter stated are as under :

----- Sl. No. Issue			
Findings	1. Whether the impugned Award is liable to be set aside for the reasons stated in the objections filed by the respondents ?	No. 2. Relief, if any.	
As	per	final	Order.
----- Reasons			

9. There is no dispute over the fact that disputes had arisen between the Contractor and the respondent and as per the terms of the contract between the parties those disputes were referred to the sole arbitration of Mr. V. J. Sood. Admittedly, it was the claim of the contractor that he was entitled to get Rs. 86,61,927.89 p. after taking into consideration the payments made to him by the respondent ONGC and it was his further claim that respondent ONGC was not at all justified in awarding penalty and claiming liquidated damages from him for delay in completion of the contractor. The Arbitrator has passed his Award on 27.1.1990 and he has found that the contractor was entitled to get Rs. 52,91,549.00 as against the claim of Rs. 86,61.927.89 p. The Arbitrator has further found that the contractor was liable to pay penalty by way of liquidated damages for the delay in completion of the work but not at the rate claimed by the ONGC but he was liable to pay Rs. 5,73,546.00. Thus, he found that the total dues of the contractor were of Rs. 47,18,003.00.

10. It is an admitted fact that the Award in question is a non-speaking award. It must be also mentioned here that the Arbitrator in question is an Officer of the respondent and when the reference was made to him by the parties had not mentioned that his Award should be a speaking Award and that the arbitrator should record reasons for his findings. When the parties while making a reference to the Arbitrator had not intended to have the Arbitrator recording reasons for his findings cannot now turn around and make a claim before the Court that the Arbitrator has not given reasons for his findings and, consequently, his Award should not be accepted by the Court. The Arbitrator's adjudication is binding between the parties because he is the Tribunal selected by the parties and the power of the Courts to set aside the Award is restricted to the cases set out in Section 30 of the Arbitration Act. An Arbitrator is under no obligations to give reasons in support of his decision reached by him unless under the Arbitration Agreement or the Deed of Submission he is required to give the same. It is also settled law that an Award passed under the Arbitration Act is not liable to be remitted or set aside merely on the ground that no reasons have been given in its support except where the Arbitration Agreement or the Deed of Submission or by an order by the Court the Arbitrator is required to give reasons. (See : S. Harcharan Singh Vs. Union of India, , and AIR 1990 1426 (SC) .

11. It is vehemently urged before me by the learned counsel for the respondent ONGC that the Arbitrator has mentioned in his Award that against the total amount of Rs. 86,61,927.89 p. respondent was liable to pay Rs. 52.92.549 without mentioning therein as to why he was awarding that amount. It must be mentioned here at the outset that his contention that no reasons are given by the Arbitrator could not be entertained and considered in view of the admitted position that while making reference to the Arbitrator he was not called upon to give reasons for his findings." Admittedly, the Arbitrator had given opportunity to both the claimant as well as the respondent ONGC to put forward their claims and to produce documents in support of the same and, accordingly, parties had produced their claims and documents in support thereof before the Arbitrator. The Award also clearly mentions that the parties were heard. They had submitted their arguments in writing. Learned counsel for the respondent is not in a position to point out that the Arbitrator has not taken into consideration a particular document or particular material fact which was on the record of the Arbitrator. As a matter of law if the Arbitrator is not mentioning in his Award any documents and is not making any reference to any document it is not open to the parties to make reference to those documents in order to come to a conclusion that the finding recorded by the Arbitrator is wrong. Apart from this technical aspect the learned counsel for the respondent is not in a position to satisfy me that the learned Arbitrator had committed an error of law on the face of the record.

12. The material on record shows that the real dispute between the parties as referred to the Arbitrator as well as per the pleadings of the parties before me was regarding certain work carried out by the Contractor. Admittedly, the

contract in question was laying of effluent disposal pipeline from the office of the ONGC at Uran to the mid sea. The said work was also admittedly to be carried out on the land and under the sea water. The Contractor had said and claimed that he had carried out excavation in the inter tidal zone as well as under the water and for that purpose he had made a claim of Rs. 86,61,927.89. This claim of the contractor was denied and disputed by the respondent. Then it was the claim of the contractor that laying of pipeline under the water was carried out by him for the length of 1392,17 mtrs. As against this it was the claim of the ONGC that it was carried out by the contractor for the length of 1041 mtrs. As per the original contract between the parties the approximate pipeline under the water was to be of the length of 600 mtrs. Admittedly, there were separate rates for the work. The work to be carried out on the land was to be carried out @ Rs. 900/- per mtr. while the work in the inter tidal zone was to be carried out @ Rs. 1,400/- per mtr. and the work under the water was to be carried out @ Rs. 7,300/- per mtr.

13. The difference between the parties was on account of some dispute regarding the various work which were carried out by the claimant contractor. The parties had given their measurements to the and the Arbitrator had also personally visited the spots Along with both the sides and had inspected the work carried out by the contractor before passing his Award. It has been urged before me by the learned counsel for the respondent ONGC that the record and proceedings of the Arbitrator do not contain any document to show that he had taken any measurements when he had visited the site and as to what were his measurements. But it is neither the claim of the ONGC in their correction application or of the contractor that the arbitrator had actually taken measurements when he had visited the site. Even in the Award even though the Arbitrator is making reference to his visit he does not say that he had actually taken measurements by going to the spot. Therefore, in these circumstances, when admittedly the Arbitrator had not taken any measurement, when the arbitrator has not observed in his Award that he was reducing the claim of the contract on account of the actual measurements taken by him, non-keeping of any document as regards the visit of the Arbitrator in the arbitration proceedings becomes totally immaterial. Similarly, when actually no measurements are taken there is no question of keeping the same on record.

14. The material on record further shows that after the disputes had arisen between the parties, the ONGC had suggested to the claimant contractor that the dispute should be referred to one Committee of three Officers and, accordingly, the same were referred to three officers, viz. Shri V. K. Sharma, D.G.M., M.M.; Shri K. C. Jain, Additional Director (P&A); and Shri S. C. Verma (Chief Engineer-Production). The contractor has made a grievance and rightly so that the respondent has not supplied to him the report given by the said Committee which was suggested and appointed at the instance of the respondent. That fact also must have been taken into consideration by the Arbitrator and it seems that the Arbitrator has taken into consideration the original approximate

measurement mentioned in the contract and the measurements given by the two parties. Along with his observation of the site and he has come to the conclusion that as against the claim of Rs. 86,61,927.89 p. the contractor was entitled to get the amount of Rs. 52,91,549.00. In the amount of Rs. 86,61,927.89 there is not only the outstanding amount for the work carried out but also the amount of penalty imposed on him. In that amount the Contractor had claimed Rs. 8,11,469.50 towards excavation under water for trench and Rs. 86,100/- towards excavation in rock in inter tidal zone which were not covered by the terms of the Contract. Besides, there were differences in measurements. It seems that the Arbitrator had taken into consideration all the above circumstances regarding the claim of Rs. 86,61,927.89 and has found that Contractor is entitled to get Rs. 52,91,549.00.

15. Learned counsel for the respondent has cited before me the case of Union of India (UOI) Vs. Jain Associates and Another, . In that case it has been held that the non-application of the mind by the Arbitrator to the relevant aspects of the dispute amounts to misconduct, as contemplated by Section 30 of the Arbitration Act. That conclusion has been arrived at by their Lordships of the Apex Court in view of the facts of that case but from the material before me I am unable to hold that there is any case of non-application of mind by the Arbitrator to any relevant aspect of the dispute between the parties.

16. It was further contended by the learned counsel for the respondent that the contractor was to complete the contract within six months and as he had not completed the same the Arbitrator was not at all justified in interfering with the penalty awarded by the respondent as per the terms of the contract. Accordingly to him the conduct of the Arbitrator is arbitrary, irrational and contrary to the terms of the contract. In support of that submission he has cited before me the case of Associated Engineering Co. Vs. Government of Andhra Pradesh and another, . But the facts of the case before me are quite distinct and different. In the instant case there was a dispute between the parties as regards the causes for the delay in carrying out the contract. It is an admitted fact that after the contractor had entered into the contract in question there was alteration and change in the site plan. From the documents produced before the Arbitrator it is quite clear that the said change is at the instance of the ONGC and the contractor had obtained the permission of the Engineer-in-charge in carrying out the work as per the said change. Then the material on record also further shows that the contractor had also sought permission by writing various letters to ONGC to extend the time for completion of contract. Admittedly, the extension of time was also granted by the ONGC. No doubt it was claimed by the ONGC that the extension of time was granted without prejudice to their right and claim to levy penalty. But the fact remains that the contractor was given extension of time to complete the contract. Therefore, it could not be said that the Arbitrator was not at all justified in going into the question as to whether the levy of fine for the delay in completion of contract. It could not be said that the Arbitrator was not justified to interfere with the fine levied and the liquidated damages claimed by

the respondent ONGC and that conduct of the Arbitrator is contrary to the terms of the contract. If the Award passed by the Arbitrator is taken into consideration then it would be quite clear that the Arbitrator has not totally exonerated the contractor. Learned Arbitrator has observed in his award as under :

"Further a penalty of Rs. 5,73,546.00 is imposed on the claimants by way of liquidated damages towards the delay in completion of the work by the claimant."

17. The terms of the contract between the parties were clearly laying down that the penalty could be imposed at the rate ranging between 1% to 10%. When that was the term of the contract and if the Arbitrator took into consideration the conduct of both the parties and the exchange of documents between the parties and came to the conclusion that the ONGC was not at all justified in levying the penalty of 10% of the contract value and reduce the said penalty then it could not be said that the Arbitrator has committed any misconduct as contemplated by Section 30 of the Arbitration Act. Thus, the case cited by learned counsel for the respondent is not applicable to the facts of the case before me.

18. In view of the above discussion I am of the opinion that from the material on record it is not possible to hold that the Arbitrator has committed any misconduct or there is any error apparent on the face of the record for setting aside the Award. I, Therefore, hold that the Award passed by the Arbitrator will have to be accepted and made Rule of the Court.

19. The contractor has made claim of interest from the date of the Award till the date of realisation. The said claim of the contractor is opposed by the respondent ONGC. Learned counsel for the respondent ONGC has cited before me the case of State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, . In that case it has been held by the Apex Court on facts that when the total damages suffered by the claimant had been quantified by the Arbitrator in the Award of Rs. 1,00,00,000/- without indicating different heads of computation of that amount, it should be assumed that the Arbitrator had taken into consideration all relevant facts in assessing the actual loss suffered up to the date of the Award and, Therefore, it has been held that the claim of interest from the date of dispute i.e., from 24.2.1979 or from 30.5.1979 i.e., the date of breach could not be allowed and the allowing of interest from the date of the Award was not interfered with.

20. Learned counsel for the respondent has also cited before me another case of Union of India v. Jain Associates and another (Supra) and has put reliance on the following head-note :

"Since Section 29 of the Act enables the Court to grant interest on the principle amount adjudicated in the Award and confirmed in the decree only from the date of the decree it carries a negative merit with it that the Court has no power to grant interest pendente life."

21. He has also cited before me the case of M/s. Hind Builders Vs. Union of

India, , and put reliance on the following head-note :-

"Generally the power to grant interest pendente lite should be treated as ancillary to the Award of damages or compensation which, but the delay in the litigation (whether in Court or by way of Arbitration). The claimant should have received much earlier. However, though pendente lite interest has been made available in Court proceedings its extension to arbitration law has acquired some technical limitations resulting in denial of pendente lite interest in most cases of arbitration. The grant of pendente lite interest would be justified only when the reference to arbitration is made in the course of a suit. Pendente lite interest cannot be awarded by an Arbitrator appointed by the parties under a private agreement for which there may be no justification in equity. These anomalies have arisen because formerly an Arbitrator could not be treated as account to which the CPC applied and because now the Interest Act, 1978, while including arbitration proceedings within its ambit, has, apart from a reference to Section 34, omitted to provide specifically for pendente lite interest. It is, Therefore, not possible to accept the contention that where an Arbitrator is appointed by the Court and a reference is made to him, he has all the powers of the court and can award pendente lite interest."

22. But all the three cases cited by learned counsel for the respondent are by the Division Bench of two judges of the Apex Court. But there is a decision of the Apex Court of the Bench of Three Judges in the matter of Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, , wherein the following principles are laid down;

"The Arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an Arbitrator entering upon the reference is a matter of substantives law, the grant of interest for the post-award period is a matter of procedure. Section 34 of CPC provides both for warding of interest pendente lite as well as for the post-decree period and the principle of Section 34 has been held applicable to proceedings before the arbitrator, though the section as such may not apply."

This case of Hindustan Construction Company Limited v. State of Jammu and Kashmir (Supra) was not cited before their Lordships in the we cases of Union of India v. Jain Associates (Supra) and State of Rajasthan v. Puri Construction Limited (Supra).

23. The present proceeding is filed by the Contractor on 26.11.1990. I would, Therefore, allow 15 per cent interest on the amount of Rs. 46,18,003/- from 26.11.1990 till its realisation.

24. I, thus, hold that the Award will have to be made the Rule of the Court and, I, Therefore, pass the following order :

"Suit No. 2847/90 is decreed as under :

The objections filed by the respondent ONGC under Sections 30 and 33 of the Arbitration Act are dismissed.

The Award passed by the Arbitrator Shri V. J. Sood dated 27.1.1990 is made Rule of the Court.

The petitioner claimant would be entitled to get interest @ 15% on the amount of Rs. 46,18,003/- from 26.11.1990.

Respondent to pay cost of the petitioner and to hear its own.

Suit No. 2740A/90 also stands disposed of with no order as to costs."