
(2015) 01 MP CK 0095
In the Madhya Pradesh High Court
Case No : Writ Petition No. 9444 of 2014

Dharamdas Tirathdas Construction Pvt. Ltd.	APPELLANT
Vs	
Union of India CPWD Indore	RESPONDENT

Date of Decision : 13-01-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Constitution of India, 1950 — Article 226

Citation : (2015) 01 MP CK 0095

Hon'ble Judges : P.K. Jaiswal, J;S.C. Sharma, J

Bench : Division Bench

Advocate : Vijay Assudani, for the Appellant

Final Decision : Dismissed

Judgement

1. Heard on the question of admission.

By this petition under Article 226 of the Constitution of India, the petitioner is praying for quashment of the orders dated 17.12.2014 and 18.12.2014 passed by respondent No. 2 - Superintending Engineer of Central Public Works Department and award of penalty on the ground of delay in completing the work.

2. Brief facts of the case are that the petitioner was awarded work for construction of 60 Men Jawan Barrack for BSF at Rewati Range under CSWT, BSF, Indore (Madhya Pradesh). The time was essence of the contract. As the work could not be completed within time, and therefore, he applied for extension under Clause 5 of the agreement. Respondent No. 1 granted extension from time to time. The work was completed on 31.12.2012. After completion of the work, a show cause notice was issued on 08.01.2014 to the petitioner as to why compensation/penalty for delay in executing the work under Clause "2" of the agreement be not fastened upon him. The petitioner duly replied the said correspondence on 20.01.2014. Learned Authority, after considering reply, passed a detailed order on 17.12.2014, directing the petitioner to pay

compensation at the rate of 1.50% for the delay of four months and two days in completing the work, amounting to Rs. 8,03,744/- on account of the delay in execution of work. It is this order, which is impugned in this writ petition.

3. Learned counsel for the petitioner submits that the respondents cannot act as Arbitrator in his own cause and recover the amount adjudicated by him, without getting the said amount adjudicated by the individual forum like Arbitration Forum/Court. In support of the aforesaid, he has drawn our attention to a decision of the Apex Court in the case of State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, (1987) 1 JT 578 : (1987) 2 SCC 160 : (1987) 2 SCR 398 : (1987) 2 UJ 85 and a Full Bench decision of MP High Court in the case of B.B. Verma and Another and S.C. Batra and Another Vs. State of M.P. and Another, AIR 2008 MP 202 : (2007) ILR (MP) 1167 : (2008) 1 MPHT 17 : (2007) 3 MPJR 251 : (2007) 4 MPLJ 610 and prays that the impugned demand be quashed.

4. It is not disputed that as per Clause 25 of the agreement if the petitioner/contractor is dissatisfied with the order passed by the Superintending Engineer, then he may challenge the same by filing an appeal before the Chief Engineer. The decision of the Chief Engineer shall become final and binding on him; and if he is dissatisfied with the aforesaid decision, then he may take recourse of Arbitrator under the provisions of the Arbitration and Conciliation Act, 1996 and if dispute comes within the purview of works contract, as defined under the provisions of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983, then he has to raise a dispute before the MP Arbitration Tribunal under the provisions of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983. Relevant Clause 25 of the agreement reads, as under:--

"Clause 25 Except where otherwise provided in the contract, all questions and disputes relating to meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any of question, claim, right, matter or thing whatsoever in any way arising out of or relating to contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same when arising during the progress of the work or after the cancellation, termination, completion and abandonment thereof shall be dealt with as mentioned herein after:

(i) If the contractor considers any work demanded of him to be outside the requirements of contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to contractor to be heard, if the latter so desires, and to offer evidence in support of him. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of Arbitrator on prescribed proforma as per Appendix X V, failing which the said decision shall become final, binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of Para (i) above, disputes or difference shall be referred for adjudication through (not readable) by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the works (not readable) there be no Chief Engineer, the Additional Director General of the concerned (not readable) CPWD or if there be no Additional Director General, the Director General of the Works (not readable). If the arbitrator so appointed is unable or unwilling to act or resigns his appointment (not readable) vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the matter aforesaid. Such person shall be entitled to proceed with the referred stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes (not readable) amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by the Chief Engineer, CPWD or Additional Director General or Director General of works (not readable) as aforesaid, should act as arbitrator and if for any reason that is not possible, then (not readable) shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand (not readable) appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days (not readable) receiving the intimation from the Engineer-in-charge that the final bill is ready for payment (not readable) the claim of the contractor shall be deemed to have been waived and absolutely barred (not readable) the Government shall be discharged and released of the all liabilities under the contract in respect in these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against (not readable) dispute and claim referred to him and in all cases where the total amount of the (not readable) by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of the claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator (not readable) if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, of arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom (not readable) what manner, such costs or any part thereof shall be paid and fix or settle the amount (not readable) costs to be so paid."

(Emphasis supplied)

5. He further submits that under the provisions of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983, there is no provision for grant of stay, and therefore, except writ petition, no other remedy is provided to the petitioner.

6. The said contention of the learned counsel for the petitioner appears to be incorrect, because under Section 9 of the Arbitration and Conciliation Act, 1996, he can file an application for grant of temporary injunction before Civil Court. The decision in the case of B.B. Verma v. State of MP (supra) is distinguishable on facts. In the aforesaid matter, the dispute, which was raised by the petitioner - contractor before the Superintending Engineer, was not decided and during pendency of the dispute, proceeding has been initiated for recovering the amount, and therefore, the said decision is not applicable to the facts of the present case.

7. Even otherwise, the dispute whether there was delay on the part of the petitioner or on the part of the department, is a disputed question of facts and the same cannot be agitated in writ petition under Article 226 of the Constitution of India.

8. For the above mentioned reasons, the writ petition is devoid of merit and is accordingly dismissed.