
(2009) 04 DEL CK 0062
In the Delhi High Court
Case No : CS (OS) No. 2578A of 1996

Durga Laxmi Builders

APPELLANT

Vs

Vice Chancellor University of Delhi

RESPONDENT

Date of Decision : 29-04-2009

Acts Referred:

Citation : (2010) 7 RCR(Civil) 2469

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

Bench : Single Bench

Advocate : Sandeep Sharma, for the Appellant; Mohinder J.S. Rupal and Jatinder Khanna, for the Respondent

Judgement

Shiv Narayan Dhingra, J.—Mr. P.R. Thakur was appointed as an Arbitrator to adjudicate the dispute between the parties. He after passing an award on 9th October, 1996 filed the award in the Court. Notice of the award was sent to the parties and respondent filed objections u/s 30/33 of the Arbitration and Conciliation Act, 1996 before the Court alleging therein that the Arbitrator had no jurisdiction to decide the matter being beyond the contract and there was no written agreement between the claimant and the respondent as to invoke the jurisdiction of the Arbitrator. The Arbitrator awarded a sum of Rs. 2,42,288/- without any basis invoking Clause 10 CC of CPWD Schedule. Clause 10 CC of the CPWD Schedule was not applicable as it was nowhere provided in the contract that any part of the guidelines of CPWD shall be applicable in this case. The Arbitrator mis-conducted himself by not going into the facts of the case properly. The initial contract between the parties was for a civil construction work to the tune of Rs. 14.75 lakh. However, the contractor was given additional work apart from the initial contract and this additional work was not to be considered as part of the contract. Moreover, the time consumed in the additional work has been wrongly considered by the Arbitrator as delay in the initial contract on the part of the objector. All the bills of additional work were submitted by the contractor as per agreed terms and conditions and same were paid and accepted by the

contractor. The contractor had not raised issue of delay nor made a complaint regarding delay at any point of time. It is also stated that in the final calculation there was a calculation mistake of around Rs. 11,000/- made by the Arbitrator. The Objector submitted that the claimant was not entitled to claims No. 1 and 3 and the conclusion arrived at by the Arbitrator that there was delay of 14 months was contrary to the contract and the facts. It is also stated that Arbitrator allowed claims without any rationale or basis and mis-conducted himself in passing the impugned award.

2. The averments made by the objector/respondent were denied by the contractor. Following issues were framed by the Court:

1. Whether the award dated 9.10.96 made and published by the sole Arbitrator Shri.P.R. Thakur, is liable to be set aside on the grounds stated in the objection petition?

2. Relief.

Issue No. 1

3. An agreement for construction of housing complex at South Delhi Campus, University of Delhi was executed between the University of Delhi and the contractor in August, 1986. Prior to this agreement a public notice of calling of tender was issued by the petitioner. In his tender the contractor had put following 4 conditions:

1. 1% rebate for the final bill within 8 months of completion of work and release of security deposit within a week of expiry of maintenance period.

2. We wish our quoted charges beyond deviation limit.

3. Rates are valid for 2 months from date of opening of tender.

4. Any increase in price of Steel, GI and CI pipes and their fittings (GI and CI) by Government of India will be charged extra.

4. Initially, the price quoted by the contractor was Rs. 16,75,795/-. However, the record of arbitration shows that there were certain modifications made in the tender and ultimate price quoted was Rs. 14,75,268.30. This tender of the petitioner was accepted vide letter dated 28th May, 1986 wherein University informed the contractor as under:

Dear Sir,

Your lowest tender amounting to Rs. 14,75,268.30 which is 66.47% above the estimated cost of Rs. 8,86,200.00 put to tender for the work mentioned above has been accepted by the University authorities. Your letter No. Nil dated 28.2.86 in which you have withdrawn your conditions from Sl. No. 1 to 4 of your above tender and confirmed the rate for item No. 21 as Rs. 125/- for 100 sq.meter instead of per se meter and your another letter No. Nil dated 7.5.86 in which you have extended the validity of the above tender upto 30.5.1986 shall form part of

the agreement.

You are, therefore, requested kindly to call on this office along with non-judicial stamp paper of Rs. 2/- in order to complete the contractual formalities on CPWD Form No. 8. You may kindly note that the date of start of this work be reckoned from the 10th day after date of issue of this letter.

5. In pursuance of above letter, the contract between the parties for construction of this complex was signed. The contract between the parties did not refer to Clause 10CC of CPWD Schedules. The contractor who had initially made a specific condition of price increase in the tender had withdrawn this condition before entering into agreement. The agreement provided Clause 10C in respect of increase in price. Clause 10C provided that if during the progress of works, the price of any material incorporated in the works and/or wages of labour increase as a direct result of the coming into force of any fresh law, or statutory rule or order and such increase exceeds 10% of the price and/or wages prevailing at the time of acceptance of the tender for the work and if the contractor thereupon necessarily and properly pays such increased price in respect of such materials/labour incorporated in the execution of work, then such increase in the material and wages if exceeds 10%, he would be entitled to reimbursement to the extent of excess over 10%. This clause also provided for benefit to the employer if the prices decreased.

6. It is settled law that Arbitrator is prisoner of the contract. He cannot travel beyond the contract while considering the dispute between the parties. In the present case, the learned Arbitrator had awarded a sum of Rs. 2,22,043/- under Clause 10CC of CPWD guidelines relating to escalation in the prices of materials observing that this amount was approximately 7 and a half per cent of the cost of the work and the escalation appears to be just, equitable and reasonable. The learned Counsel for the contractor has sought to justify awarding of this amount in view of judgment of *Narain Das R.Israni v. DDA 1996(1) Arbitrator law Reporter 602* and *K.N.Sathyapalan (dead) by LRs v. State of Kerala and Anr.* and another decision in suit No. 1832/98 between the same parties decided by this Court on 18th January, 2002 and a decision in suit No. 1833A/98 between the same parties.

7. It is settled law that judgment in each case decides and adjudicates the lis in that particular case and unless and until a general law is laid down by the judgment under Article 141 of Constitution of India, the judgment cannot be read laying down a law. None of the judgments cited by the petitioner is relevant in this case in view of the peculiar facts that the contractor in this case made escalation as a pre-condition of contract in his tender document, but later on he withdrew this condition of tender and signed an agreement containing different escalation clause. It is settled law that the parties are bound by the contract between them and the Arbitrator who has to adjudicate the dispute between the parties is also prisoner of the contract. He cannot invoke principles of equity, fair play etc. to justify travelling beyond the contract. The Arbitrator cannot ignore

the specific terms of the contract entered into between the parties and if he ignores he does misconduct. In Food Corporation of India Vs. Chandu Construction and Another, , the Supreme Court observed that Arbitrator being a creature of the agreement between the parties, has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of the legal misconduct which could be corrected by the Court.

8. The Arbitrator in this case could not been relied upon Clause 10 CC of CPWD general conditions since the contract between the parties was very specific about price escalation and the contractor had specifically given up his pre-condition of price escalation before signing the contract. I therefore hold that the award allowed by the learned Arbitrator on the basis of Clause 10CC of the CPWD, general conditions was beyond jurisdiction. CPWD general conditions did not form part of contract.

9. Claim No. 3 of the contract was for a sum of Rs. 3,29,400/- on account of infructuous expenditure incurred due to prolongation of the contract. The learned Arbitrator considered that the work got completed in 20 months instead of stipulated period of 6 months. The claimant had to maintain his establishment and incur overhead expenditure at site for 14 additional months beyond the contemplated period of 6 months. He therefore allowed a sum of Rs. 2,50,000/- as infructuous expenditure.

10. It is an undisputed fact that the contract for construction awarded to the contractor was for a sum of Rs. 14,75,268/-. However the actual work carried out by the contractor was of over Rs. 30 lakh, i.e., more than double the amount of contract. As is revealed from the documents, when the contract for the construction of housing complex was going on, Delhi University had other civil construction works. In normal course of business, the University should have called fresh tenders since the other works were of more than Rs. 15 lakh but it seems that the present contractor was a favourite of Delhi University and Delhi University instead of issuing fresh tenders asked the contractor to do additional civil works under the same contract. So, all subsequent works at different places in the South Delhi Campus were allowed to be done by the present contractor at the same rates which he quoted for the housing complex and it is in this way that a contract for Rs. 14.75 lakh got swelled into a contract of over Rs. 30 lakh. Since the contractor had willingly undertaken to do works other than contracted work at the rate, terms and conditions, this does not mean that the completion period of entire work including the additional work undertaken by the contractor had to be 6 months as has been considered by the Arbitrator. The Arbitrator lost sight of the material evidence that the actual contract was for Rs. 14.75 lakh. This amount had been received by the contractor long back. The contracted work would have been completed long back and only the bills for subsequent additional works were being given by the contractor to Delhi University. When additional work was undertaken by the contractor at different sites obviously

additional time in completion of work would be required. The Arbitrator could not have considered that the additional work undertaken by the contractor was part of the same work, neither was it the case of the contractor or of the University that the original work swelled into the double the amount. Rather it is the case of the contractor himself in his claim that he had to carry his machinery at different places in South Campus and that is why he had to spend infructuous expenditure. The claim reads as under:

work related to housing complex but work was got carried out at several places in the whole of campus which resulted in infructuous expenditure on construction of water tanks, and brick plate forms for mixing cement concrete and mortar at various places. Lot of wastage of materials was there in working at various places and there were wastage of labour also in executing the work in various places. The infructuous expenditure was incurred in transportation of cement and various building construction materials to different sites inside the campus.

11. The contractor claimed under infructuous expenditure the wages for engineers at the rate of Rs. 3,000/- per month for 14 months, wages for work Mistri at the rate of Rs. 2150/- per month for 14 months, 2 supervisors at the rate of Rs. 2450/- for 14 months, Pump and mixer operator and expenses on various other miscellaneous matters. The claim on the face of it was frivolous and ridiculous. If the contractor had undertaken additional work apart from the initial housing complex at different places in the campus at the same rate, it cannot be expected that the contractor would have done this work without employing engineers, work mistris, supervisors, drivers and mixers. The items rates quoted by the contractor take care not only of the salaries of different staffs which are employed by the contractor but also take care of his profits, administrative expenses and overhead charges. When the contractor accepted additional work of more than 15 lakh at different sites in the campus he was very well aware that he would have to get this work executed through engineers, supervisors, mistris, etc. Claiming charges for employing engineers, work mistris, supervisors, etc. for the work which he carried out apart from the original work during the extended period was a surprising claim and it is surprising that the Arbitrator entertained such a claim. Even if original work had some additional items of work, the claimant specifically provided under Clause 12 that in case there were alterations, additions or substitutions in the original specifications, drawings, designs and instructions such additions shall not invalidate the contract and the time for completion of work shall stand extended in the same proportion as the altered, additional or substituted work bears to the original work. Over and above this a further period to the extent of 25% of the time shall be allowed to the contractor.

12. It is clear that even in case of additions and alterations in the original contract work, the time was liable to be extended in proportion to the additions and alterations. This case is not of the additions to the original specifications and drawings. The original work consisted of construction of a housing complex at

one site but the University and the contractor together agreed for more civil works not related to housing complex, done at different places in South Campus. The time consumed in these subsequent works cannot be considered as delay in original work nor can be considered that the subsequent works are part and parcels of the original work or original contract. The subsequent works could have been treated as part and parcel of the original contract only if the additions or alterations were by way of change in specifications, designs, drawings as provided in Clause 12. Even if we believe that the additional work was to be part of the original contract, looking into the facts that additional work was more than the original contract, the time for the original contract was to be proportionately increased and plus additional 25% time was to be given in terms of Clause 12. The proportionate increase in time for the additional work will be 7 months and if we take 25% more increase in the total time, the work would have been required to be completed in approximately 17 months. The work was completed in 20 months. By no stretch of imagination, it can be said that there was 14 months delay in completion of work.

13. Moreover, there is no document to show that there was any delay on the part of University of Delhi. A contractor, by delaying the contract, cannot claim compensation in respect of delay and enrich himself. Delaying the contract cannot have premium. There is no evidence on record to show that during currency of contract, respondent wrote any letter to university about any hindrance being created by University in execution of work by contractor.

14. I consider that in the present case, the Arbitrator grossly mis-conducted himself in law by transgressing the express provisions of the contract as stated in Clause 12 and not taking into consideration that it was not a case of one contract but several contracts which the contractor undertook after the present contract, without any written agreement. I therefore consider that award of the Arbitrator of claim No. 3 was without jurisdiction and liable to be set aside.

15. Under claim No. 4, the Arbitrator has allowed a sum of Rs. 15,000/- to the contractor for purpose of Chowkidars and watch and ward staff observing that though the petitioner had not produced any Chowkidar as a witness nor had produced watch and ward staff as a witness to show that he had employed them but since the construction work did require watch and ward and for that purpose Chowkidars had to be employed by the contractor he allowed to them Rs. 15,000/-. For the reasons stated in para 14 above for which I have disallowed the claim on infructuous expenditure on account of delay of 14 months, this claim is also not tenable. Every contractor is to employ watch and ward staff at the construction site during the period he continues the construction. He is not to be paid separately for watch and ward staff. It is part of his work and job.

16. Claim No. 5 is in respect of the interest. The Arbitrator has allowed 12% interest on different claims. I consider that 12% interest allowed by the Arbitrator is on higher side I consider that 6% simple interest would meet the ends of justice. The award in respect of claim No. 1(b), claim No. 3 and claim No.

4 is hereby set aside. The award in respect of claim No. 1, claim No. 2 is upheld. The claimant/contractor would be entitled to 6% p.a. simple interest on these claims from the date amount became due till the payment. The petition is disposed of in above terms.