
(2009) 10 DEL CK 0028
In the Delhi High Court
Case No : O.M.P. 504 of 2008

G.D. Tewari and Co.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-10-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10C, 11(6), 33, 34

Citation : (2010) 7 RCR(Civil) 2295

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Sandeep Sharma, for the Appellant; Anusuya Salwan, for the Respondent

Judgement

Manmohan, J.—Present objection petition has been filed by petitioner-claimant u/s 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") challenging the Award dated 4th July, 2008 passed by Mr. K.K. Varma, Sole Arbitrator.

2. Briefly stated the facts of the present case are that respondent floated a tender for work under the name and style of "Construction of Delhi College of Engineering in West Delhi on the periphery of Rohini Complex at Badli, Delhi Development of site excluding bulk services. SH: C/o Roads in residential area. Phase-I".

3. After negotiation, the work was awarded to petitioner-claimant vide letter dated 8th September, 1986. Though 17th March, 1987 was the stipulated date of completion, the work was actually completed on 30th January, 1991.

4. As the petitioner-claimant was aggrieved on account of non-payments of some of its claims, it filed a petition u/s 11(6) of Act, 1996 in this Court. During the pendency of the said proceedings, Mr. K.K. Varma was appointed as a Sole Arbitrator.

5. After hearing the parties at length, the Arbitrator rendered his Award dated

4th July, 2008. Subsequently, on 28th July, 2008 the Arbitrator u/s 33 of Act, 1966 corrected an error in para 4.7.3. of the Award.

6. Petitioner-claimant by way of the present petition has challenged the Award in respect of Claim Nos. 3, 5, 6, 7 and Counter Claim No. 1.

7. Mr. Sandeep Sharma, learned Counsel for petitioner-claimant submitted that the Arbitrator had erroneously rejected petitioner-claimant's claim under Clause 10C of the Agreement. Mr. Sharma stated that the Executive Engineer was himself the labour officer and in case the minimum wages as prescribed from time to time were not paid then the Executive Engineer was empowered to make deductions. Therefore, Mr. Sharma submitted that there was no need to give any prior notice claiming payments under Clause 10C of the Agreement. In the alternative, Mr. Sharma submitted that notice in fact had been issued to respondent vide Exhibit C-21 dated 22nd December, 1987 and Exhibit C-26 whereby daily wages register had been submitted for verification and necessary action.

8. On the other hand, Ms. Anusuya Salwan, learned Counsel for respondent submitted that issuing a notice u/s 10C was not an empty formality. In this context, she drew my attention to the following paragraphs of the Award:

4.3.1. The recorded date of completion of work as also accepted by claimants during 10th hearing, is 30.01.1991. During arguments, claimants referred to exhibits C-42 dated 28.09.2002; C-43 dated 19.09.1995 and C-44 dated 22.02.1996 regarding their claim under Clause 10C. When asked, claimants were unable to produce any reference made to respondents during the currency of the contract i.e. upto 30.01.1991 regarding Clause 10C.

xx xx xx xx xx xx xx xx 4.3.2(d) Hence the issue of notice is not a mere formality but a matter of substance. Since Clause 10C is meant for reimbursement of higher wages paid to labour timely notice would have provided an opportunity to respondents to inspect the books of accounts of claimants to verify whether the amounts due on account of the stated statutory increase in the wages of labour have been actually and properly paid or not. In the absence of any notice at the relevant point of time, respondents could not carry out this exercise of verification of books of accounts as enshrined in Clause 10C.

xx xx xx xx xx xx xx xx 4.3.4. Mere payment of minimum wages to labour, which is a requirement under the law, does not entitle claimants for reimbursement under Clause 10C. For reimbursement under this clause, issue of timely notice, as envisaged in the clause itself, is mandatory and in the absence of such a notice, the claim is not tenable. I, therefore, award a sum of Rs. Nil against this claim.

9. Ms. Salwan further stated that Exhibit C-26 was never received by respondent and, in fact, it bore a forged receipt. She also pointed out that respondent had objected to the production of said document during arbitral proceedings itself

and the said objection had been duly recorded in the said proceedings.

10. As far as Exhibit C-21 is concerned, she stated that the same was not a notice as contemplated by Clause 10C of the Agreement but was merely a letter by virtue of which petitioner-claimant had asked for payment of some of its outstanding bills.

11. On a perusal of the Agreement, I find that Clause 10C reads as under:

10C. The contractor shall within a reasonable time of his becoming aware of any alteration in the price of any such material and/or wages of labour, give notice thereof to the Engineer-in-charge stating that same is given pursuant to this condition together with any information relating thereto which he may be in a position to supply [Emphasis supplied].

12. Upon a reading of the aforesaid Clause, I find that it stipulates issuance of a mandatory notice before any claim under Clause 10C can be entertained by the respondent. It is settled law that an arbitrator is a creature of contract/agreement and an award passed by the arbitrator has to be in conformity with the contractual provisions [see D.C.M. Ltd. v. M.C.D. and Ors. reported in (1972) 2 Arb. LR 314 (SC), Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation, Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, and Bharat Coking Coal Ltd. Vs. M/s. L.K. Ahuja and Co.,

13. Moreover, I find that the Arbitrator has given cogent reasons for insisting on the prior mandatory condition of notice being complied with.

14. I am also in agreement with Ms. Salwan that by virtue of Exhibit C-21 that petitioner-claimant had only asked for payment of some of its outstanding bills and the said document cannot be taken as a notice issued in compliance with Clause 10C of the Agreement.

15. As far as Exhibit C-26 is concerned, in my opinion, the same cannot be relied upon in the present proceedings specially when the genuineness of the said document was denied by respondent before arbitral tribunal and admittedly, petitioner-claimant had not taken any step to prove the genuineness of the said document. Consequently, in my view, the Arbitrator has rightly rejected petitioner-claimant's claim with regard to payment under Clause 10C of Agreement.

16. Mr. Sharma next submitted that the Arbitrator had unjustifiably rejected 50% of petitioner-claimant's claim on account of prolongation of work. In this context, Mr. Sharma drew my attention to the finding of the Arbitrator whereby petitioner-claimant's claim for prolongation of work was disallowed to the extent of 50%. The relevant portion of the Award reads as under:

4.5.4 As per Clause 2 of the agreement, compensation for delay in completion of work can be levied upto 10% of the estimated cost put to tender but as per

exhibit R-20 dated 09.12.1996, compensation has been levied @5% of the estimated cost put to tender while granting extension upto 30.01.1991, the date of completion of work. Hence it is logical to conclude that claimants are not responsible for at least half of the delay which occurred in completion of work. Accordingly, claimants can be compensated for half the amount of Rs. 1,94,973/- stated in para 4.5.2 above towards escalation in cost of construction. I, therefore award a sum of Rs. 97,487.00.

17. Mr. Sharma submitted that the Arbitrator could not have rejected 50% of the petitioner-claimant's claim without giving a finding that petitioner was partly responsible for delay in completion of the work.

18. On the other hand, Ms. Salwan tried to sustain the Award on the ground that as petitioner-claimant was partly responsible for the delay, the Arbitrator was well within his right to allow only half of the claim.

19. In my view, the Arbitrator could not have disallowed half of the petitioner-claimant's claim on the sole ground that though Clause 2 of the Agreement gave petitioner-claimant a right to claim compensation upto 10% for extending the contract, respondent had levied only @5% while granting extension of work. In my opinion, to reject the petitioner's claim, the Arbitrator had to reach the conclusion that petitioner was responsible for the delay - which conclusion he has not reached in the present case.

20. In view of aforesaid, I was inclined to remand the matter back to the learned Arbitrator, but keeping in view the fact that the contract in dispute had been awarded on 8th September, 1986 and the work had actually been completed on 30th January, 1991. I modify the Award by awarding full amount of Rs. 1,94,973/- under Claim No. 5 as jointly calculated by both the parties during the arbitration proceedings. It is pertinent to mention that though petitioner-claimant under Claim No. 5 had initially claimed before the Arbitrator a sum of Rs. 7,70,000/- but during arbitration proceedings both parties had agreed that escalation, if any, payable as per Clause 10CC would work out only to Rs. 1,94,973/-.

21. In view of aforesaid finding, the Award needs to be modified with regard to Claim No. 7. Mr. Sharma suggested that he would be satisfied if Claim Nos. 7(a) and 7(c) were modified to the extent that the entire salary of Supervisor Rs. 64,000/- instead of Rs. 32,000/- and Chawkidar Rs. 96,600/- instead of Rs. 48,300/- were awarded by this Court. Consequently, I modify the Award and the amount awarded under Claim Nos. 7(a) and 7(c) would now be read as Rs. 64,000/- and Rs. 96,600/- respectively.

22. As far as Claim No. 6 and Counter Claim No. 1 are concerned, I find that the Arbitrator has given cogent reasons for rejection of said claims. The relevant portion of the Award with regard to these claims is reproduced hereinbelow:

4.6.3 The claim is based on the premise that claimants 'incurred expenditure' of

Rs. 4,35,000/-and the machinery purchased remained blocked for 46 months. Claimants have not placed any document on record to establish that they had actually incurred expenditure of Rs. 4,35,000/- for purchasing the machinery. Assuming that the machinery was purchased, claimants as prudent contractors, have not indicated the steps taken by them to mitigate the losses arising out of the machinery (if purchased) standing idle. While framing the claim, it seems that claimants forgot to take into account that they had taken road roller on hire from respondents for a period of 476 days for which hire charges @ 189/- per day have been recovered. This omission raises a question mark on the genuineness of the claim. In the absence of any documentary evidence of having incurred expenses amounting to Rs. 4,35,000/- for purchase of machinery, the claim remains unsubstantiated. I, therefore, award a sum of Rs. Nil.

xx xx xx xx xx xx xx xx 5.1.1 Bitumen in 632 drums was issued to claimants and claimants were to return empty bitumen drums failing which recovery is contemplated @ Rs. 50/- per drum as per provisions on page 143 of the agreement. Claimants were unable to produce any documentary evidence of having returned empty bitumen drums to respondents. I, therefore award a sum of Rs. 31,600.00 against this counter-claim.

23. In my view, the Award in respect of Claim No. 6 and Counter Claim No. 1 needs no interference in Section 34 jurisdiction.

24. In view of aforesaid, impugned Award is upheld except with regard to Claim No. 5, 7(a) and 7(c) which stand modified to the aforesaid extent. Accordingly, present petition stands disposed of.