

(2009) 12 DEL CK 0215
In the Delhi High Court
Case No : CS (OS) No. 2461 of 1997

Good Value Engineers

APPELLANT

Vs

M.M.S. Nanda, Sole Arbitrator and Union of India (UOI)

RESPONDENT

Date of Decision : 07-12-2009

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7

Citation : (2009) 12 DEL CK 0215

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Jaya Tomar, for the Appellant; Sachin Dutta, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.

I.A No. 8922/1998 in CS(OS) No. 2461/1997

1. These are the objections of the respondent under Sections 30 and 33 of the Arbitration Act, 1940. The challenge by means of these objections is with respect to claim Nos. 1,4,5,6,7,8,9 and 12 besides the issue of interest granted by the Award at the rate of 15% per annum.

2. One common finding which runs through the entire Award and which I will be referring to is that the disputes centres around what was the extent of soft soil, hard soil or hard rock at the site. This is relevant because the cost for excavation of hard rock is obviously more than the excavation of hard soil or soft soil. Further, if there is a rate given in the contract for excavation of soft soil which is lesser and excavation is done on hard rock for which the rate is higher then the deviation order based on the rates of the hard soil/soft soil in the contract would obviously not be much relevant to determine the rates of payment for hard rock. With respect to each of the claims, the Arbitrator after arriving at a finding that the hard rock was approximately 95% has however awarded compensation to

the contractor not at the figure of 95% but only at the figure of 87%. The basic grievance of the Union of India is that hard rock should have been taken only at 78% and not at 87%. The difference is therefore only of 9%. With this prorroque, I am taking up each of the claims as argued by the counsel for the objector one by one.

3. The first challenge is to Claim No. 1. Under this claim, the claimant claimed an amount of Rs. 45,974/- towards excavation of hard rock in the foundations. The Arbitrator after considering the different contentions of the parties has narrated in para 13.6 the facts as urged by the contractor and on the basis of which he has awarded the claim under this head. This para 13.6 reads as under:

13.6 The claimant brought out that on page 86 of MB No. 448 in add portion the excavation in the foundation has been indicated in soft rock whereas at site hard rock was met with. The claimant referred item No. 3 on page 87 of MB No 448 and item No. 3 on page No. 1 of MB No 11 the excavation has been shown as hard rock whereas while preparing DO No 15 the excavation has been considered in hard soil. The claimant further referred item No. 4 and item No. 5 on page 75 and 76 of MB No. 448 the width of foundation has been shown as 0.98 meter as against 1.03 m for the building walls and .68 meter against 0.98 for dwarf wall. The drawing for the foundation was supplied by the department and claimant produced, it is seen on the perusal of MB No. 448 on pages 75 & 76 only one step has been considered in the wall foundation as against 3 Nos given on the drawing and actually executed at site.

(Emphasis added)

In view of the aforesaid para, it becomes clear that the MB(Measurement Book) did not record the correct measurements at different places. Simultaneously, the Arbitrator has not accepted the hard rock percentage at 95% as found or 78% as claimed by the objector. The Arbitrator has resorted to honest guess work after duly considering the various facts, evidence and circumstances as narrated in this part of the Award pertaining to Claim No. 1, and which is also the golden thread otherwise running through each of the claims awarded. I do not find any perversity or unreasonableness whatsoever in the actions of the Arbitrator, in that, it can be said that the Arbitrator has misconducted himself or the proceedings by making an honest guess work. It is settled law and so held right since Mohd. Salamatullah and Others Vs. Government of Andhra Pradesh, that an Arbitrator is wholly justified once there are some materials on record to make honest guess work on the basis of the same. This view of the Supreme Court was further reiterated by it in the case of A.T. Brij Paul Singh and Others Vs. State of Gujarat, . There are also other similar judgments holding that the Arbitrator is entitled to arrive at a finding of fact which may not be perfect to the extent of being tested on a golden scale. In fact, the Arbitrator in my opinion has been very reasonable because he has not accepted the hard rock at 95%, although he has found it to be so, but has only awarded cost for excavation at 87%. I do not therefore, find that the Arbitrator has misconducted himself or the proceedings

while allowing this claim.

4. The next claim which was argued was Claim No. 4, which I may very sarcastically add is for "huge" amount of Rs. 4410/-. I fail to understand as to how the time of this Court can indeed be wasted by such objections which seem to be taken by Union of India and other authorities in routine. I need not say further on this claim except that I find that the same basis which was applied of the hard rock being at 87% has been taken as the basis for awarding this claim of Rs. 4410 and I do not find any misconduct of the Arbitrator in this regard. The objection against this claim is therefore dismissed.

5. Claim No. 5 urged before the Arbitrator pertains to excavation work with respect to making of a drain. I again need say no further except that once again as stated above the Arbitrator has awarded hard rock excavation at 87%. The counsel for the objector has contended that whereas the claim was only of Rs. 37,344/-, the Arbitrator has awarded Rs. 40,780/- and therefore the Arbitrator has misconducted himself. This contention is in my opinion baseless for two reasons. Firstly, during the conduct of the proceedings, although a different figure may have been initially stated in the statement of claim, it may thereafter transpire that actual work and the entitlement or actual rate arrived at by the Arbitrator may entitle a person to a higher amount than as claimed and the Arbitrator cannot be said to have committed any illegality because such a course is even permissible to a Civil Court under Order 7 Rule 7 of the Code of Civil Procedure, 1908. In fact the Arbitrator is not even bound by the technicalities of pleadings as provided in the CPC, but the CPC itself entitles the Arbitrator as per Order 7 Rule 7 to take the course he has taken. In this case, in any case, there is not too much of difference and the difference is only of about Rs. 3000/ -. I may note that there is a valid basis for increase of this figure inasmuch as the counsel for the non-objector has drawn my attention to the fact that the figure of Rs. 37,340/- has gone up to Rs. 40,780/- because the latter figure includes the claim of escalation. In view of the aforesaid, I do not find that the Arbitrator has at all misconducted himself while awarding amount under Claim No. 5.

6. The next claim which has been objected to is Claim No. 6. While dealing with Claim No. 6, the Arbitrator has given the following observations in para 18.3 of the Award and which runs as under:

18.3 The claimant argued that actual excavation has been done in the hard rock whereas department has considered 100% hard soil. The claimant produced page 14 of MB No. 11. The respondent has depicted the area as rocky but item shown there is in hard soil. If area is rocky, the question of excavation in hard soil does not arise. The claimant further referred schematic representation of Road near static tank in MB No. 11 page 12 is not true representation of road, it is seen that width of road has not been correctly taken by respondent thus actual work done by the claimant stands reduced substantially.

(Emphasis added)

Once again the Arbitrator has referred to the mistake apparent from the measurement book and therefore the Arbitrator has resorted to the honest guess work of the figure of 87% for hard rock excavation. In view of my discussion with respect to Claim No. 1, I do not again find any fault with respect to awarding of this claim.

7. Claim No. 7 is the major claim and which has been awarded by the Arbitrator for a sum of Rs. 16,28,707/-. The claim under this head has three subheads. The first sub-head is once again as to the percentage of the hard rock. The second sub-head is with respect to the depth of the excavation and the third sub-head is for the area of jungle clearance.

The Arbitrator has in this regard, held in para 19.8 as under:

19.8 Keeping in view of above para discussed, statement of claims, pleading in defence and examining the submissions by both the parties I hold that:

(a) Lease element of hard rock has been considered by the respondent. The respondent confirmed at site @ 95% hard rock and claimant 100% rock however I consider 87% hard rock and 13% hard soil.

(b) The respondent has considered excavation upto 1.5 meter depth and recorded in MB. In add back DO No 3 excavation upto 6 meter has been considered by the respondent and work done at site is as per scope of work given in DO No 3 and has not been denied by the respondent. The claimant is entitled upto depth of 6 meters. I consider the excavation actually done at site is to be paid to the claimant.

(c) The rates of item 5 of Sch A section VII jungle clearance accepted by the Accepting Officer is frequently high ie. Rs 18 per sq. m. and no restriction has been imposed by increasing the quantity if required. The amendment No. 1 issued by jungle clearance at the rate of Rs. 1.80 per sq. me for 100 sq meter only. Whereas the extent of work done is 6962 sq. meter against 100 sq meter. Thus quantity of work got executed is abnormally high as specified in contract agreement. After visit of site I consider Rs 6/ - per sq. meter including %age quoted by the contractor is reasonable for the balance quantity.

So far as sub para (a) of para 19.8 above is concerned once again the same is on the basis of 87% hard rock excavation and which I have repeatedly referred to while dealing with earlier claims. So far as the depth of excavation is concerned, I note that the Arbitrator has correctly noted that the deviation work order itself mentions for excavation up to 6 metres and therefore the Arbitrator has accordingly awarded excavation up to a depth of 6 metres and not 1.5 metres as recorded in the MB. In order to appreciate as to how excavation charges for a greater depth is awarded, I must at this stage, refer to paras 19.6 and 19.7 of the Award which are the precursors to the conclusions given in paragraph 19.8. The said paras 19.6 and 19.7 read as under;

19.6 The claimant referred page 46 of MB No. 11, the formation level of the

radar platform has been shown as 333.15 as against 333.10. Similarly, in different parts of radar platform different formation levels have been considered. The claimant referred drawing No. S/RP-1 forming part of CA, the final level of radar platform was fixed as 333.50. Out of that 15 cm is WBM and 25 cm is RCC of top of WBM which clearly explains that the formation of radar platform was to be kept 333.10. To substantiate his argument he referred para 2(e) of G Es letter No. 8015/RCP/134/E8 dt. 28th December, 1993. The claimant further argued that place where the radar platform has been built was the highest feature on the ground in the general area consisting of 100% rock and whole of platform was brought to one level i.e. 333.10. Thus respondent has reduced the actual work done by considering different level of formation on radar platform and also increasing formation level to 333.25.

19.7 The claimant further brought out while referring page 46 to page 50 of MB No. 11, the reading have been altered by overwriting and erasing the old reading with the intention to cause loss to the claimant. Referring page No. 47 of MB No. 11 the respondent has considered initial and final level as 00 with a view to reduce the work done. Left side of radar platform, the final levels have not been considered for computing the volume in cutting and also large number of triangles have been omitted on both side of radar platform thereby reducing the volume of work done.

8. It is quite clear that the aforesaid paras clearly show that the claimant/non-objector not only caused the unnecessary levelling of the platform which was made of total rock, the claimant in fact brought out as to how volume of work was wrongly reduced. The Arbitrator has further also noted that there are over writings and erasing of the old readings in the MB. After recording the aforesaid facts, the Arbitrator arrived at the conclusion with respect to the depth as stated in para 19.8 (b). Surely, this was one plausible view which the Arbitrator was entitled to take from the facts which were found by him on account of the actual work done at site by the non-objector and also the discrepancies and alterations in the measurement book. In my opinion, therefore no fault can be found with regard to the conclusion in para 19.8 (b).

9. As regards the third sub-head with respect to awarding of the rate of jungle clearance at Rs. 6 per sq. m instead of Rs. 1.80 per sq. m. I may note that counsel for the objector vehemently contended that there was initially a typographical mistake in the contract and the rate of jungle clearance was in fact Rs. 18 per ten sq. m. In my opinion this argument is of no consequence because the contractual rate will only apply to the contractual area. When the actual area goes way- way beyond the contractual area, the contractor is not bound by the contractual rate. In this case, the contractual extended area was 100 sq. m but the arbitrator notes that the jungle clearance was done for 6962 sq. metres instead of Rs. 100 sq. m. The Arbitrator has thereafter made an honest guess work and increased the rate to Rs. 6 per sq. mt. I have already referred to the judgments in the case of Mohd. Salamatullah(supra) and M/s A.T Brij

Paul(supra), and I am of the view that the Arbitrator was fully justified, once certain material was available before him, to resort to making an honest guesstimate to award a particular rate for jungle clearance once the area of jungle clearance exceeded well beyond the contractual amendment area which was prescribed under the contract.

10. The next claim which was objected to was Claim No. 9 pertaining to the work done towards concreting etc. The basic contention of the contractor in this regard was that whereas he has done M-20 concreting work but the objector has given it a rate which is lesser even than the M-15 rate as stated in the contract document.

The relevant paragraphs pertaining to this claim are paragraphs 21.3 and 21.4 which reads as under:

21.3 The respondent further brought out that quantities of items shown in Appendix I are not supported with measurement details. The respondent submitted that star rate for M-20 grade design mix concrete as worked by the department is Rs. 1564.37 per Cum. The claimant vide his letter No. 003/23/GV/TR dt. 31.5.94 (Exhibit 7 of claimant contractor) stated that the actual rate of M-20 concrete works out to Rs. 3700/- per Cum and has now made out a rate of 2614.98 Cum and is not agreed to. 21.4 The claimant brought out that star rates forwarded by AGE (B/R) letter No. 807/RCP/BR/367/E8 dt. 3rd August, 95-one year three month after completion of concreting and six months after completion of work the rate for M-20 concrete was even lower than the rate of M-15 concrete in CA. This was not agreed and DO was signed under protest. In addition railing was provided around the radar platform have not been accounted properly. A dwarf wall was constructed around platform has also not been recorded.

Accordingly, in view of the aforesaid discussion, I am not persuaded to interfere with respect to this finding as I do not feel that the Arbitrator has misconducted himself or the proceedings.

11. Claim No. 12 is only for an amount of Rs. 14,580. This is a claim for transportation because according to the contractor it transported the cement bags from different locations than as was envisaged in the contract resulting in higher cost. I do not think that for this amount of Rs. 14,580/-. I need spend much time because the Arbitrator has given a finding of fact with respect to the different locations from where the cement bags were taken up than as specified in the contract. Accordingly, no challenge can be led with respect to this claim.

12. That takes me to the last issue of the rate of interest which has been given under the Award. The Supreme Court in the recent catena of judgments reported as *Rajendra Construction Co. v. Maharashtra Housing and Area Development Authority* and Ors. 2005 (6) 678 , *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others* , *Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd.*, and *Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy* and

Another, and State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd. (2009) 3 Arb. LR 140(SC) has held that the courts in accordance with the changed economic scenario and the liberalization of the interest regime, which has resulted in the consistent fall in the rates of interest, must grant the lower rate of interest instead of high rate of interest as granted by the Award. The Supreme Court has also mandated the courts to take notice of the fact that lower rate of interest must be granted more so if the Arbitration proceedings and the objections before the court are pending for a long time. In the present case, the Award is of more than 12 years back and the objections are also pending since more than 11 years, therefore, in accordance with the mandate of the Supreme Court judgments, I award interest at the rate of 9% per annum simple. Therefore, wherever interest is granted at 15% per annum in the Award, the same shall be read as 9% per annum simple. However, I am not changing the date from which the interest has been granted.

13. Though, I have reduced the rate of interest and which is because of the mandate of the Supreme Court judgments, I find that the objections, in this case were totally misconceived. If these objections were decided in the year of their filing i.e in the year 1998, the rate of interest need not have been at 9% per annum simple. I therefore, hold that the non-objector is to be compensated for the costs which he has incurred. Accordingly, the objections are dismissed with costs quantified at Rs. 25,000/-. Let the Award be made a rule of the court subject to the modification in the rate of interest from 15% to 9% simple.

14. With these observations, the objection petition and the suit stands disposed of.