

(2008) 12 DEL CK 0149
In the Delhi High Court
Case No : CS (OS) 2604A of 1999

J.G. Engineers (P) Ltd.

APPELLANT

Vs

National Building Construction Corpn. Ltd.

RESPONDENT

Date of Decision : 11-12-2008

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Arbitration and Conciliation Act, 1996 — Section 34
Contract Act, 1872 — Section 70

Citation : (2008) 4 ARBLR 578 : (2008) 8 ILR Delhi 1

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : P.K. Mullick, for the Appellant; Yogesh Malhotra, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The arbitral award dated 28th August, 1999 was filed in this Court and notice of filing whereof was issued on 30th November, 1999. Notice was accepted on behalf of the counsel for the petitioner herein on the same date. The petitioner has not filed any objections to the award. The respondent filed IA. No. 2119/2000 under Sections 30 and 33 of the Arbitration Act, 1940 objecting to the award. An affidavit in opposition thereto was filed by the petitioner and a rejoinder thereto filed by the respondent. The counsels have been heard.

2. The admitted position is that an agreement dated 14th August, 1978 was executed between the parties whereunder the respondent engaged the petitioner as a Piece Rate Worker (PRW) for executing the work of construction of 100 houses in Libya. The time for completion of the said 100 houses was fixed at 18 months from 1st September, 1978. Additional work of 28 houses was also awarded by the respondent to the petitioner. The agreement, aforesaid, provided for arbitration by the Project Director of the respondent or some other officer not directly connected with the subject work. Disputes and differences having arisen between the parties, and by then the appointing authority having been changed

from the Project Director to the Chairman cum Managing Director of the respondent, on 13th November, 1985 an arbitrator was appointed. However, the said appointed arbitrator was unable to proceed further and ultimately vide order dated 22nd March, 1991 of this Court the arbitrator who has rendered the award was appointed as the sole arbitrator. The petitioner herein made claims under 15 heads before the arbitrator. The respondent made claims under 8 heads. The award has allowed only claims No. 3 to 6, 9 and 13, that too partly of the petitioner. The remaining claims of the petitioner and all the claims of the respondent have been disallowed. Neither any objection has been preferred by the petitioner to its claims disallowed nor has the respondent objected to its claims which were disallowed (though in writing it was merely stated that they have been wrongly rejected). The respondent has only objected to the claims as aforesaid of the petitioner which have been allowed. The said objections will hereinafter be discussed claim-wise.

Re: Claim No. 3

3. This claim for Libyan Dinar (LD) 230,781.900 was for payment of items of works executed by the petitioner and not paid by the respondent. The petitioner made this claim as extra and over and above the rates quoted by them. The respondent refused extra payment and rejected the claim for the reason that all the items claimed by the petitioner as extra were covered within the rates quoted by the petitioner for the relevant items and covered in the technical specifications part 1 and 2 forming part of the agreement. The petitioner contended that only technical specification part 2 formed part of the agreement and technical specification part 1 did not form part of the agreement and maintained that extra payment was due to it. The arbitrator found that there was no document bearing the title "technical specification part 1 applicable to the agreement between the parties" but held that under the technical specification part 2 and the general specifications forming part of the contract the work was to be executed in a workman like manner and held certain specifications which were being treated by the petitioner as extra items to be impliedly covered in the contract. The arbitrator awarded LD 74690 to the petitioner under the said head.

4. The main argument of the counsel for the respondent was that payment for extra items was prohibited under the contract and thus the award under this head is contrary to the terms of the agreement and thus liable to be set aside. Reliance in this regard is placed on Clause 5A in the contract and which is as under:

5A Extra items

The said PRW shall have to execute any extra substituted items arising during the progress as per the written directions of the corporation engineer. The rates of such extra/substituted items shall be settled mutually between the PRW and the corporation.

5. Relying on Bhagat Ram Sahani and Sons Vs. Delhi State Industrial

Development Corpn., and State of Jammu & Kashmir and Another Vs. Dev Dutt Pandit, it is contended that where it was the term of the contract that directions for extra work had to be in writing, allowing a claim for extra work without any such direction in writing to carry out the same was a jurisdictional error and which could be corrected by the court. It was argued that the arbitrator being a creature of the contract between the parties, if ignores the specific terms of the contract, exceeds his jurisdiction calling for interference of the award by the court. It was emphasized that an arbitrator acts beyond his jurisdiction if he travels beyond the contract and the same constitutes an error apparent on the face of the record justifying the setting aside of the award. The contention was that in view of specific provisions contained in Clause 5A (supra) of the agreement between the parties, the amounts claimed by the petitioner under claim No. 3 towards extra items were beyond the scope of arbitration.

6. The counsel for the petitioner has not refuted the aforesaid as a pure proposition of law. He has, however, argued with reference to the arbitral record that it was nowhere the plea of the respondent before the arbitrator that the claim No. 3 being for extra item could not be allowed in view of Clause 5A of the contract. On the contrary, it was the case of the respondent before the arbitrator that the works claimed by the petitioner as extra items were included in the ordered quantity and the rates fixed therefore and thus the petitioner was not entitled separately to claim for the same; this contention of the respondent has been found to be incorrect by the arbitrator. It was further contended that in Bhagat Ram Sahani (supra) immediately upon claim for extra work being made, DSIDC had denied that the said works had been entrusted to the contractor or had been executed by the contractor; similarly in Dev Dutt Pandit (supra) also it was the admitted position that there was no direction in writing for carrying out the works. On the contrary, in the present case it was not in dispute that the works claimed as extra had been executed by the respondent. It was argued that thus the provisions of Section 70 of the Contract Act were attracted in the present case. Reliance was also placed on judgments of Single Judges of this Court in Hindustan Construction Corporation Vs. Delhi Development Authority and Another, Architects Bureau v. Delhi Agricultural Marketing Board 2002 III AD (Delhi) 32 and Civil Engineers (India) Vs. Delhi Development Authority, in which such claims were allowed.

7. In my opinion in view of the judgments in Bhagat Ram Sahani & Dev Dutt Pandit (supra), the reference to the judgments of the Single Judges of this Court is of no avail. I do not find Clause 5A in the instant case to be any different from para materia Clause in Bhagat Ram Sahani (supra). However, a peculiar feature of the present case is that no such plea was taken before the arbitrator. In the objections filed before this Court also the respondent has objected to the finding of the arbitrator of the works claimed as extra items under claim No. 3 being covered by the contract. However, no argument in that respect has been addressed. It is only in the alternative that in the objections for the first time reliance was placed on Clause 5A (supra) and which objection alone was

vehemently pressed during the course of hearing.

8. What has to be considered is whether, when a plea which is factual in nature is not set up before the arbitrator, can objections in that respect be set up before the court at the first instance. An award could be set aside under the 1940 Act when there was an error apparent on the face of the record or when the arbitrator is found to have misconducted himself. In the absence of an objection/plea being taken before the arbitrator and which plea was not such which could be considered without pleadings or proof, it can neither be said that there was an error apparent on the face of the record nor that the arbitrator has misconducted himself. It is always open to a party to a litigation and is commonly known to happen, to give up a defence which may have been available to it. In the absence of the defence or the plea, the arbitrator who is to decide in an adversarial fashion, as the court is also to decide, cannot be expected to render decision/award on such matter. If no decision/award could have been rendered by the arbitrator without the plea, no fault can be found with the award on such ground. The award cannot be said to be invalid on this ground. A point not raised before the Arbitral Tribunal cannot be permitted to be raised for the first time before the court unless from the award itself the error of law becomes apparent.

9. I have been persuaded to take the aforesaid view also for the reason that I find a basic folly in objection being pressed against an award without the same being pressed before the arbitrator. As the record reveals, the matter remained pending in arbitration from 1985 till 1999 and since then is pending before this Court. The alternative dispute redressal machinery in the form of arbitration has not been as successful as it ought to have been for the reason of the same being not much more expeditious than the courts. This has led to a vicious cycle. If such objections not taken before the arbitrator and which are diametrically opposite to the pleas taken before the arbitrator are to be entertained, the same would totally nullify the purpose and intent of arbitration. As aforesaid, even a plea given up in court of first instance is ordinarily not permitted to be taken in appeal. There is no reason to entertain an objection to the award contrary to the said principle.

10. Not only was there no plea as aforesaid and qua which objection has been raised before this Court for the first time but I find that the defence raised by the respondent before the arbitrator to claim No. 3 also negates and estoppes the respondent from setting up the said objection in a petition under Sections 30/33 of the Act. When the respondent contended before the arbitrator that the works claimed as extra by the petitioner were included in the ordered quantity, the respondent admitted that there was a direction in writing to the petitioner to carry out the said works. In a given case it may be permissible to, in the alternative, set up a plea that if the same were not found to be included in the ordered quantity, the claim was, in any case, not maintainable because of no direction to carry out the said works being contained in any writing. However, as aforesaid, no such alternative plea was setup before the arbitrator. The

respondent persisted with the plea of the works being included in the ordered quantity, in the objections under Sections 30/33 of the Act before this Court also. Merely because the said defence of the respondent has not been found to be correct, it cannot be said that ipso facto follows that the claims are to be disallowed as extra items also. The contract does not give any specific form of writing in which directions for extra work is to be issued/given. It is also not the requirement of the contract that the direction in writing has to be prospective or in advance in the course of operation of the contract. The contract did provide for the petitioner to remain in continuous contact with the respondent; several documents may have been exchanged between the parties. Once the stand of the respondent is that the respondent treated the said works to be a part of the ordered or included in the ordered quantity, it is not difficult to envisage that in the writings, correspondence, documents, bills which may have been exchanged between the parties, the consent of the respondent to the petitioner carrying out the said works would be contained and which would satisfy the requirement of Clause 5A (supra). However, the occasion for the petitioner to lead evidence to the said effect before the arbitrator did not arise owing to the respondent having not taken the said defence inspite of the petitioner expressly in its claim petition stating that there was no specific rate in the contract for the same and at places also calling the said works as extra items of work. The only conclusion which is possible in these circumstances is that there was writing from the respondent to the petitioner for carrying out the said works.

11. The use of the expression jurisdictional error in Bhagat Ram Sahani (supra) had made me wonder whether allowing the claim No. 3 was such which struck at the very jurisdiction of the arbitrator. However, I find that the same becomes a jurisdictional issue only when it is either admitted or in evidence that there was no writing for the extra items. However, it is not a jurisdictional issue in the facts of the present case and does not strike at the root of the matter.

12. The counsel for the respondent had also feebly contended that the award does not give any reason for allowing the amounts allowed under claim No. 3 and does not give any basis for the same and is bad for this reason. I, however, find that the arbitrator has given norms/guidelines broadly followed by him and even though the basis/calculation for individual items allowed under claim No. 3 has not been stated, I again do not find the same to be a reason for setting aside of the award. The arbitrator has the final word in such factual matters and the court is not to sit in appeal over the award.

13. I, therefore, do not find any merit in the objection to claim No. 3 awarded and dismiss the same.

14. Re Claims 4, 5 and 6

The said claims of the petitioner for LDs 234439.368, 219082.590 and 12915.816 respectively were for damages due to undue and unjustified prolongation of the contract. It was the contention of the petitioner that though

the houses were to be completed by 29th February, 1980 the work was actually completed and taken over by the respondent on 1st December, 1982. It was further the case that extension of time was granted upto 30th December, 1982. It was contended that the prolongation of the contract period was caused on account of laches and breaches of the respondent and, therefore, the respondent was liable to compensate the petitioner for the extra expenses incurred by the petitioner owing to such delay. The arbitrator found delay on the part of the respondent in complying with some of its obligations. The arbitrator further found that the amounts claimed by the petitioner were highly exaggerated and not on a sound rationale basis. The arbitrator in spite of noticing the contract between the parties as under:

Rates to be finalized

The rates accepted by the PRW shall be firm and shall include all his expenses for execution and handing over the works to the corporation as well as for maintenance during the maintenance period according to the terms of the contract. The PRW shall have no right to claim any increase in the agreed contract rates because of increase in the price of living or increase in price of oil or any other increase whatsoever.

awarded some LDs 5000 under claim No. 4, LD 25,800 under claim No. 5 and LD 1400 under claim No. 6.

15. The counsel for the respondent besides submitting that the allowing of the aforesaid claims inspite of noticing the aforesaid clause in the contract and finding himself to be bound by the same is an error apparent on the face of the record has also argued that the award of the aforesaid amounts is again arbitrary without any basis and the principle of 8% increase followed was not applicable in the instant case.

16. The counsel for the respondent placed reliance on *State of Orissa Vs. Sudhakar Das (Dead) by Lrs., and Ramachandra Reddy and Co. Vs. State of Andhra Pradesh and Others*, to contend that in the absence of any escalation clause an arbitrator cannot assume any jurisdiction to award any amount towards escalation and the award which grants escalation suffers from a patent error and is liable to be set aside. It was further contended that mere extension of time would not entitle the contractor to claim extra payment for increase in rates of labour and material. Per contra, the counsel for the petitioner has in this regard relied upon *Kidar Nath Sharma Vs. Union of India and Another*, *Bengal Traders v. West Bengal State Electricity Board* 2001 (Supp) Arb Ir 7 (SC) to contend that a claim for escalation is different from a claim for damages due to prolongation of work. A single Judge of this Court in *Kidar Nath Sharma (supra)* notwithstanding the judgment of the Apex Court in *Sudhakar Das (supra)* held the amount awarded to be not towards escalation charges but on account of compensation for delay. Similarly, the Apex Court in *Bengal Traders (supra)* held that what was prohibited in the contract was escalation of unit rates and the

same did not apply to the claim for damages on account of delay.

17. The counsel for the respondent in rejoinder contended that the clause in the contract in the present case set out above was extended beyond the contractual period also and the award finds the delay attributable to the petitioner as well and thus no damages could be awarded in favour of the petitioner.

18. At the outset I may state that I find inconsistencies in the award on claims No. 4 to 6. Para 4.2 of the award notices that the respondent had protected itself against the claim for compensation by including a clause in the contract as aforesaid and further holds that the clause, though found to be onerous and unconscionable, was nevertheless to be honoured by the arbitrator. Notwithstanding the same the arbitrator in para 4.3 of the award proceeds to award as aforesaid under the claims No. 4, 5 and 6 without stating as to how, if the aforesaid clause of the contract was to be honoured, the award even if for much less than the claimed amount was sustainable. It is the settled legal position that an award which is found to be inconsistent is liable to be set aside. It was held in *K.P. Poulose Vs. State of Kerala and Another*, the Apex Court held that if the arbitrator arrives at inconsistent conclusions it amounted to misconduct within the meaning of Section 30 of the 1940 Act. Again in *Union of India (UOI) Vs. V. Pundarikakshudu and Sons and Another*, it was held that award was liable to be set aside when on the one hand there was award of damages, suggesting that party to be guilty of breach and a finding to the contrary, the award was liable to be set aside for inconsistencies. This Court recently in *UOI v. Sanghu Chakra Hotels Pvt. Ltd.* 2008 (3) Arb. LR 255 (Del) held a mutually contradictory award to be contrary to public policy within the meaning of Section 34 of the 1996 Act.

19. As far as the distinction made out by the counsel for the petitioner is concerned, I find that the language of the contract in the present case to be absolutely barring any claim for such compensation also. Clause 6 of the General Terms and Conditions provides that the respondent shall not be responsible for any variation at any stage and no claims at any stage shall be entertained as a consequence of variations, if any, except otherwise provided in terms & conditions. The expression, "or any other increase whatsoever" used in the contract indicates that the parties had agreed that no claims of the petitioner for the reason of any delay shall be entertainable. This being the position of the contract, the principle in *Bhagat Ram Sahani (supra)* aforesaid would become applicable and the award under the said claims is found contrary to the contract and thus found to be suffering from a jurisdictional error. The objection to claims No. 4, 5 and 6 thus succeeds and the award to that extent is set aside.

Re: Claim No. 9.

20. The petitioner claimed LD 36877.050 for enhancement of rates on contractual items from start of work till 29th February, 1980 due to increase in minimum wages and payment of desert allowances. The respondent contested

the said claim contending that under the contract it was the liability of the petitioner to pay the minimum wages and there was no provision in the contract permitting the petitioner to claim enhancement on account of increase in minimum wages. The arbitrator awarded LD 18151 against this claim.

21. The counsel for the petitioner has sought to justify the said award by contending on the basis of Tarapore and Co. Vs. State of M.P., and Pride Construction Company v. DDA (1990) 1 Arb Ir 16 that since minimum wages were statutorily payable, even in the absence of a contractual term, such increase is reimbursable by the respondent. However, I may notice that in Tarapore (supra) the Apex Court has held that "insofar as the increased payment on account of rise in the rates of minimum wages is concerned the parties were not in any sort of agreement - express or implied to reimburse the same" and thus allowed the said claim. Similarly in Pride Construction Company also there was a clause permitting increase on account of increase in wages. On the contrary, in the present case the contract as aforesaid expressly provides that the respondent shall not be liable to pay increased amounts for any reason whatsoever. Under the contract, the petitioner alone is responsible for the manpower brought from India to Libya. Thus, the judgments relied upon by the petitioner are not applicable and there is merit in the objections of the respondent to claim No. 9 and which is allowed and the award thereunder is set aside.

Re : Claim No. 13

22. The said claim for interest at 18% per annum for LD 18073.356 for delay in payment of 38th running account bill, LD 8795.154 for delay in payment of final bill and LD 25194.375 for delay in release of amount of security deposit has been allowed to the extent of interest at 8% per annum in the sum of LD 5666.37 for 38th running bill, LD 3517 for the final bill and LD 11686.03 for security deposit. The only objection to the said award is on account of rate of interest. Relying upon a passage from MCGregor on damages and Miliangos v. George Frank Textiles Limited 1977 1 QB 489 it was argued by the counsel for the respondent that interest ought to have been granted not as per the rates prevalent in India but as per the rates applicable to interest on LD, since under the contract payment was to be made in LD. I, however, find the said argument to be misconceived. Though payment was to be made in LD but it is the admitted position that the profits of the petitioner from the said contract could not be kept by the petitioner in LD but had to be repatriated and kept in Indian rupees only. The citations of the respondent also are to the effect that in award of interest the rates prevalent of the country where the petitioner is based are to be relied upon and not of the country in whose currency the payment is to be made. Thus, the petitioner is entitled to interest as prevalent here and no challenge has been made to the award of interest at 8% per annum in the Indian conditions. The objection to claim 13 is thus dismissed.

23. Lastly, the counsel for the respondent has objected to the apportionment of

cost of arbitration in the ratio of 40/60 between the petitioner and the respondent. It was argued that since the arbitrator has found the petitioner to have made exaggerated claims, following the Dev Dutt Pandit (para 232) (supra), the entire costs of arbitration ought to have been borne by the petitioner. The arbitrator has in award as to costs held the parties liable for the costs incurred by themselves and apportioned the costs aforesaid towards the fee of the arbitrator, travel and stay of arbitrator to Libya as aforesaid.

24. The observation as to costs came to be made by the Apex Court in Dev Dutt (supra) owing to the contractor therein having carried out less than 50% of the work and having been paid more than 50% of the total contract value and having made a claim totally disproportionate to the contract value. In these circumstances, the Apex Court set aside the award of costs in favour of the contractor. However, in the facts of the present case it cannot be said that the claims were farfetched. The claims which have been disallowed and the claims allowed and objections where against have been upheld has also been done for the reason of the law as evolved since. It was not the case of the respondent also before the arbitrator that the claims were contrary to law. In the circumstances, I do not find any ground to set aside the award as to costs. The discretion in the award of costs of arbitration ought not to be interfered with by the court unless is contrary to the award.

25. The arbitrator has also awarded interest at 8% per annum on the awarded amount from the date of the reference till the date of the payment. NO arguments have been addressed on the same. I find the rate of interest of 8% to be reasonable and the award to that extent shall stand.

26. Thus, the award allowing claims 4, 5, 6 and 9 is set aside. The award on claims 3 and 13 is made rule of the court and decree is passed in terms thereof.