

(1989) 08 DEL CK 0050

In the Delhi High Court

Case No : Suit No. 1814A of 1986 and Leave Application No. 157 of 1980

Madan Lal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 31-08-1989

Acts Referred:

Citation : (1990) 1 ARBLR 159 : (1990) 40 DLT 330 : (1990) 19 DRJ 310

Hon'ble Judges : P.N. Nag, J

Bench : Single Bench

Advocate : B.K. Divan and Maehswar Dayal, for the Appellant;

Judgement

P.N. Nag, J.

(1) The petitioner contractor has filed this petition u/s 14 of the Arbitration Act requiring respondent No. 2, arbitrator, to file the award and the depositions made by the parties before him in this court for further proceedings as required by law.

(2) In compliance with the notice issued by this court in this petition, the arbitrator respondent No. 2, had filed the award and the depositions in this court. After the filing of the award in court notice of the filing of the award was served on the petitioner and respondent No. 1. Objections under Sections 30 and 33 of the Arbitration Act read with Section 41 of Indian Arbitration Act on behalf of respondent No. 1 (I.A. 157/87) along with an application u/s 5 of the Limitation Act read with Section 41 of the Arbitration Act for condensation of delay (IA 158/87) in filing is 157/87 were filed. is 158/87 was allowed by this court on 29th September, 1988 and the objections were taken on record. No objections have been filed within the statutory period on behalf of the petitioner.

(3) The necessary facts in filing this suit and I A 157/87 are : The petitioner was given the work of increasing the capacity Najafgarh Drain from R.D. 58.000 to R.D. 50,000 vide agreement No. 7/NDD-1/80-81 for an amount of Rs. 27,41,393.00 at the quoted rate of the petitioner of Rs. 27,41,393.00 at the quoted rate of the petitioner of Rs. 6.39 per cubic metres. During the currency of

the work some additional work was got to be executed by call of fresh tenders. The petitioner approached the department and showed his willingness to execute the additional work also on the terms and conditions as contained in the agreement No. 7/NDD-1/80-81 and in May, 1981. He gave an undertaking and requested the department that the additional work may also be given to him at the already quoted rate of the 6.39 per cubic metre for the additional quantity of 2-9-1887 cubic metres of earth work. A copy of the undertaking has been annexed as annexure R A to the affidavit in the form of evidence of Shri P.C. Goha, Executive Engineer dated 30th November, 1988. Some disputes arose over the contract turn increasing capacity of Drain from Rd 58,000 to Rd 50,000 and the matter was referred to the sole arbitration of Shri M.S Hussain, Director (UT) C.W.C to adjudicate the disputes. In fact the sole arbitrator was appointed by Shri O.P. Kumra, Chief Engineer (I & F, Delhi Administration. I S.B.T. Buildings. Kashmere Gate, New Delhi vide letter No. CEF/ARB 94/85/4837 dated 14th May, 1985. The arbitrator after visiting the site with the parties, and having read and considered the pleadings and documents filed by the parties, evidence adduced, and considered and weighed the arguments advanced by the parties and their counsel made the award on 25th August, 1986. The arbitrator found that the work executed at site for disposal of excavated earth was not according to the designed section of the agreement and, Therefore, he allowed the claim of the claimant of Rs. 1,97,580.52 as extra payment for extra lead only and the claim of extra lift was rejected as he was of opinion that no extra lift was involved. He also awarded interest to the claimant @ 10% p.a. on the awarded sum of Rs. 1,97,580 52 with effect from 25th August, 1986 to the date to the payment of decree whichever is earlier.

(4) As mentioned above, the respondent No. I, has filed objections (IA 157/87) to this award dated 24th August, 1986 on the grounds, inter alias that the department entrusted this additional work on the undertaking given by the petitioner that he would not charge any extra rate for the quantity beyond his agreement, further he would not claim any extra rate on the quantity excess over deviation limit of 50% and further he would not go into arbitration on these accounts. Respondent No. I has further relied on a provision of agreement. He relied on Chapter 4 page 89 of the agreement under the heading "Drawings" according to which the contractor shall execute the work as per designs which could be modified and changed without any additional claim whatsoever. He has further relied on Chapter 5 paragraph 5 03 of specifications of work under the heading "Rates". This deals with the rate quoted which shall be inclusive of all the cost of material, labour components, supervision charges, maintenance etc. The contractor shall not be entitled for any additional rate beyond unit rates. The rate shall also be inclusive of excavation with all leads and lifts in all kinds of soil. The excavation which is carried out beyond the required section will not be paid separately. According to respondent No.1 all payments have been made to the petitioner, which have been accepted by him without protest, and the petition is not entitled to claim any extra amount for the extra lead as awarded by the

arbitration as he has already given an undertaking not to charge such an amount for extra lead and lift. Further under the agreement the petitioner is not entitled to interest @ 10% p.a. with effect from 25th August, 1986 as awarded in the award by the arbitrator and the same is without jurisdiction. Therefore, the arbitrator has misconducted himself in the proceedings and the award is liable to be set aside under Sections 30 and 33 of the Arbitration Act. In reply to the objections filed on behalf of respondent No. 1 the petitioner has filed an affidavit slating therein that the claim in dispute before the arbitrator was not with regard to the additional quantity of work executed. The claim before the arbitrator was only for the work executed with extra lead and lift undertaken which was not contemplated under the terms of the contract. During the currency of the work the respondent No. 1 desired additional extra lead to be undertaken than contemplated and the petitioner intimated that for the same extra rate would be payable and it was also intimated that the matter was referred to higher authorities for approval and, Therefore, the petitioner was directed in "the meantime to execute the work. However, after completion of the work respondent No. 1 refused to make payment for the said extra lead and lift. The claim in dispute has no concern whatsoever with the undertaking given by the petitioner. The award is based on evidence adduced, arguments on behalf of the parties advanced before him and after inspection of the site along with the parties by the arbitrator and it was found that only extra lead was payable as the execution of the work was not according to the designed section of the agreement. The arbitrator has as such given an award only with regard to the extra lead which was got done over and above the design in terms to the agreement. It has been denied by respondent No. 1 the petitioner that the arbitrator has misconducted himself and the award is contrary to the terms and conditions of the contract besides undertaking given by him. According to the petitioner, the award is perfectly legal and the objections are frivolous, misconceived, unfounded and baseless.

(5) I have heard counsel for the parties during the course of arguments, counsel for respondent NO.1 strenuously urged that the award of the arbitrator is liable to be set aside as the arbitrator has misconducted himself in the proceedings inasmuch as (a) he has given the undertaking, annexure Ra already referred to, that he would not charge any extra rate for the quantity beyond his agreement, he would not claim any extra rate on the quantity excess over deviation limit of 50% and further that he would not go into arbitration on these accounts. In spite of this undertaking given to the department, the arbitrator has allowed the claim of the petitioner; and (b) the arbitrator has allowed the claim of the petitioner in violation of the terms of the contract.

(6) In order to appreciate the contention of learned counsel for respondent No. 1 it will be necessary to refer to the award, relevant portions of which are extracted below: . Whereas Shri O.P. Kumra, .Chief Engineer (I & F) Delhi Administration, I.S.B.T. Building, Kashmere Gate, New Delhi vide his letter No. CEF/ARB 94/85/4837 date 14-5-1985 appointed me as Sole Arbitrator to

adjudicate the claim in terms of the contract in respect of the work for increasing capacity of Ng drains from Rd 58,000 to Rd 50,000 Sh : Earth work above sub-soil water drains level vide agreement bearing No. 7/NDD I of 1980-81. Whereas I entered upon the reference and held several hearings and as well as time was extended up to 22-9-1986 by mutual written consent of the parties by virtue of the contract agreement for making and publishing the award Now after having with due care, after visiting the site with the parties read and considered the pleadings and documents filed by the parties and evidence adduced and having heard and considered and weighed the arguments advanced by the parties and their Counsels I, Sole Arbitrator do hereby make and publish award as under: Claim No. 1. Claim No. I pertains for an additional sum of Rs. 1 lacs on account of extra lead and lift. The Claimants submitted that the contract entered into between the parties contains schedule of quantities and wherein it is provided that the earth work in excavation in all kinds of soils up to specified level.....as per design section. That blue print showing the design section of the terms and banks of the drains according to which the work was contemplated to be executed. That the Claimants contended that during currency of the work Respondents changed the site design section which resulted an additional lead and lift of the excavated earth the contemplated in the agreement It is also stated that the Claimants also approached the Higher Authorities for malting payment for additional lead and lift for disposal of" earth .The Respondents intimated to the Claimants that the claim of extra lead and lift shall be settled on receipt of the decision of the Superintending Engineer but ultimately the same was not paid. That the Respondent, denied the claim and stated that nothing extra is payable. That he site was inspected Along with the parties and it was found that the work executed at- site for disposal of excavated earth was not according to the designed section of the agreement and. Therefore, there was force in the contention of the Claimant for extra payment. It was however, observed that the claimants are not entitled for any extra lift as no extra lift was involved. 1. accordingly consider that the Claimant. is entitled for Rs 1,97,580.52 (Rupees One Lac Ninety Seven Thousand Five Hundred Eighty and Paise Fifty Two) for extra lead which 4 award in favor to the Claimant. Claim No. 2 Interest Claimant is entitled for interest @10% per annum on the awarded sum of Rs.1, 97,580.52 P. w e f. 25th August 1986 to the date of the payment of decree whichever is earlier.

(7) At this stage, it will be very relevant and pertinent to printout that the arbitrator, Shri M.S Husain. Director (UT) C.W.C. is a very senior officer and Class I officer of the department and was appointed by Shri O.P. Kumra. Chief Engineer (I & F), Delhi administration in accordance with the arbitration clause. In other words he is a skilled and. expert person on the subject and the parties themselves have selected to decide the question at issue between them through him by entering into an agreement. As is apparent from the award itself against Claim No 1 additional sum of Rs 3 Lacs on account of extra lead-and life was claimed by the petitioner but,. however ,the arbitrator after having inspected the

site along with. the parties found that the work executed at site, for disposal of the excavated earth was not according to the designed, section of the agreement and, Therefore, there was force" in the contention of Claimant for the extra, payment. However, the contractor was found not entitled to any extra lift by the arbitrator as no extra lift was involved. The arbitrator has, Therefore, awarded only Rs. 1.97,580.52 out of Rs, 3 lac's claimed by the contractor for the extra lead only. Further more" the award has been given by the arbitrator not only after visiting the site along with the parties but also after considering the pleadings and documents filed on behalf of the parties, evidence adduced, hearing and considering and weighing the arguments advanced by the parties and their counsel.

(8) While dealing with first contention of counsel for the petitioner it is no doubt true, that by the undertaking (Annexure RA) the petitioner has undertaken that he would not charge extra rate for the quantity beyond his agreement, he would not claim any extra rate on the quantity excess over deviation limit 50% and he would not go into arbitration on these accounts, but such alleged claim of the petitioner has been disallowed by the arbitrator and the petitioner has accepted this position by not filing objections thereto. The respondent No. 1, Therefore, cannot have any grievance in so far as this aspect is concerned.

(9) This takes me to the second contention of counsel for respondent No. 1 that the arbitrator has allowed the claim of the petitioner of Rs. 1,97,580.52 on the ground that the work executed at site for the disposal of excavation earth was not according to the, designed section. In this connection counsel for respondent No. 1 has relied upon the various terms of the contract. The petitioner has heavily relied upon Chapter 4 page 89 of the agreement which reads as under:the contractor shall, execute the works according to such clarification and without any extra charge and shall also do all such works and things as may be directed by the Engineer-in-charge or his authorised representative, being considered necessary for the proper completion of the work as implied by the drawings and specifications even though Such works and things are not specially shown and described in the said drawings, and specifications supplementary dimensions, drawings may be given by the Government in addition to these already given and changes may also be effected in them and the contractor will have to do the works on the basis of the supplementary drawings or changed specifications. without any additional claim whatsoever..... Further the petitioner has relied on paragraph 5.03 of Chapter 5 on Specifications of Works reading as under : 5.03 Rates: The rate quoted shall be inclusive of all. the cost of materials, labour and supervision charges maintenance etc. The contractor shall not be entitled for any additional rate beyond unit rate. The rate shall also be inclusive for excavation with all leads and lifts in all. kinds of soil up to a level of R.L. 206.35 at R.D. 65,000 and R.L 207.00 at Rd, 29,000. The excavation which is carried out beyond the required "section will. not be paid separately.

(10) These provisions read with other provisions relied in the objections indicate

that the rates of excavation of earth with all leads and lifts refer to the disposal material as per designed section. According to respondent No. 1 even the designs can also be modified without any additional claim whatsoever. However, in this case nothing has been shown that the designs for the execution of the work were modified and changed at any stage by the department. On the other hand, as already referred to the arbitrator after having visited the site with the parties, read and considered the pleadings and documents filed by the parties, evidence adduced and having heard and considered and weighed, the arguments advanced by the parties and their counsel has come to a finding of fact that the work executed at site for disposal of excavated earth was not according to the designed section of the agreement and, Therefore, he has awarded amount of Rs. 1,97,580.52 for the extra lead involved. Hence he did not award any extra lift as no extra lift was involved. In this case during the execution of the work the disposal was to be according to design section but the same was changed by respondent No.1 during the execution of work without changing the drawing and designs and as such extra lead of the material was involved and, Therefore, and arbitrator has rightly allowed the claim of the petitioner in respect of extra lead only. Therefore, no infirmity can be found out with the award of the arbitrator.

(11) It is settled principle of law that the jurisdiction of the Court hearing objections u/s 30 and 33 is not an appellate jurisdiction. It is now well settled that an award can be set aside only u/s 30 of the Arbitration Act and the decision of the arbitrator should not be lightly interfered by the court. In this case as already referred to the arbitrator is skilled and expert on the subject and he has announced the award after visiting the site with the parties, read and considered the pleadings and documents filed by the parties and evidence adduced and having heard and considered and weighed the arguments advanced by the parties and their counsel. The arbitrator is the sole judge of the quality and quantity of the evidence adduced before him. Bearing these facts in mind it will not be permissible for this court to interfere and set aside this award, in this connection I am fairly supported by the observations of the Supreme Court in *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, . In this case, there was no violation of any principles of natural justice. It is not a case where the arbitrator has refused cogent and material factor to be taken into consideration. The award cannot be said to be vitiated by non-reception of material or non-consideration of the relevant aspects to the matter. Appraisal of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisal of the evidence. In the instant case, there was no evidence of violation of any principle of natural justice. The arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion than

the one arrived at by the arbitrator but that by itself is no ground in our view for setting aside the award of an arbitrator."Lord Goddard. C.R. in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd* (1948) 2 All Er 187 observed at pp. 188/189 of the report as follows : , A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do In this case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavor to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Court should be slow indeed to set aside his award. This in our opinion is an appropriate attitude.

(12) Viewed from another angle the contention of respondent No. 1 that the award has been given in violation of the terms of the agreement and on the basis of erroneous interpretation of agreement, cannot be again accepted as perhaps, it is not permissible for the court to look into the contract and interpret that such contract has not been incorporated in the award.

(13) The contentions of counsel for respondent No. I, thus, fail and are rejected Issue No. 1 is decided in favor of the petitioner and "against respondent No. 1 No, other point has been urged. Objections (IA 157/87) are dismissed and the award dated 25th August, 1986 is made a rule of the court. A decree shall be drawn up in terms of the award which shall form part thereof.