
(2006) 07 MAD CK 0023
In the Madras High Court
Case No : O.P. No. 787 of 2002

Madras Fertilizers Limited

APPELLANT

Vs

Shriram Engineering Construction Company Ltd. and K.
Rajagopalan Raj Associates

RESPONDENT

Date of Decision : 26-07-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2006) 07 MAD CK 0023

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : Jayesh B. Dolia, for Aiyar and Dolia, for the Appellant; T.R.
Rajagopalan. for V. Anantha Natarajan, for the Respondent

Final Decision : Allowed

Judgement

S. Rajeswaran, J.—The petitioner is a Government of India undertaking and have filed the above O.P. u/s 34 of the Act, 1996 to set aside

the award dated 1.10.2001 passed by the 2nd respondent-arbitrator.

2. The brief facts leading to the case are as follows: The petitioner invited bids for the construction of quarters for Central Industrial Security Force

at Manali New Town and the 1st respondent was selected and the work was awarded on 18.10.1990 and the time for completion of the work

was 14 months. Certain disputes arose between the parties and the matter was referred to the 2nd respondent-arbitrator to decide the disputes.

The 1st respondent claimed payments towards (1) pending bill payments amounting to Rs. 32, 37, 626.55 and (2) loss of profit and goodwill

amounting to Rs. 50,00,000/-. The 1st respondent contended before the arbitrator that the petitioner herein did not make the payment to the bill

raised for a sum of Rs. 23,33,983.28 which was recommended by the Architect and also for the bill value of Rs. 9,30,643/- for extra works

certified by the Architect totalling a sum of Rs. 32,37,626.55/-, which is the first claim. It was the further contention of the 1st respondent that

because of the non-payment of bill in time, the 1st respondent had to face severe financial crisis and their reputation got damaged and so they are

entitled for a sum of Rs. 50,00,000/- which is claim No. 2. The 2nd respondent-arbitrator by an award dated 1.10.2001 allowed a sum of Rs.

25,41,353.30 towards the 1st claim and a sum of Rs. 2,54,135/- towards claim No. 2. Aggrieved by the award dated 1.10.2001 this O.P. has

been filed.

3. The following grounds have been raised by the petitioner for assailing the award dated 1.10.2001:

(1) The 2nd respondent-arbitrator failed to consider para 3.03 of the letter of the award which prohibits the claim for escalation.

(2) The 2nd respondent-arbitrator has misunderstood the Clause 41.1(A) to 41.1(E) of General Conditions of Contract and failed to see that the

1st respondent has claimed increase in rates under the disguise of the loss and expense without any proof.

(3) The 2nd respondent-arbitrator erred in law in accepting the recommendation of the Architect for Rs. 23,33,983.28 when the Architect has no

jurisdiction to do so under Clause 52 of General Conditions of Contract (GCC).

(4) The award of interest at the rate of 18% per annum by the 2nd respondent-arbitrator is totally unjust as the question of payment of interest

does not arise at all.

4. Heard the learned Counsel for the petitioner and the learned Senior Counsel appearing for the 1st respondent. I have also gone through the

documents and the judgments referred to by them in support of their submissions.

5. Learned Counsel for the petitioner while reiterating the grounds contained in the petition submitted that the award passed by the 2nd

respondent-arbitrator is contrary to the clauses contained in the contract and therefore the same is liable to be set aside. He relied on the

judgments of the Hon'ble Supreme Court reported in M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya

Project and another, and Srinivasiah Vs. Sri Balaji Krishna Hardware Stores, .

6. Per contra, the learned Senior Counsel appearing for the 1st respondent submitted that none of the grounds set out u/s 34 of the Act, 1996 gets

attracted warranting interference u/s 34 of the Act, 1996.

7. A copy of the agreement has been filed in the typed set of papers filed by the petitioner. This agreement was entered into between the parties on

28.12.1990 and in para 2 of the agreement it is categorically mentioned that the Letter of Acceptance dated 18.10.1990, Letter of Award dated

18.10.1990, contractor's letter dated 18.9.1990 and 27.8.1990, the tender offer dated 10.8.1990 and the tender enquiry dated 24.7.1990 shall

be deemed to form as a part of the agreement. In the letter of the award dated 18.10.1990 in para 1.03 it is specifically mentioned that the award

of work is subject to the following terms and conditions and supersedes any contradictory provision that may exist in any other contract

documents.

8. Para 3.03 of the letter of award is also vary relevant for the purpose of this case as it is specifically mentioned in para 3.03 that the rates shall be

firm and not subject to escalation of any kind, throughout the pendency of the contract until its completion. In para 3.07 it is stipulated that during

the execution of the contract if the contractor is called upon to carry out extra items of work other than those stipulated in the award of work, the

unit price for those items would be arrived at as per Sub-clause (i) and (ii) in para 3.07. In para 3.08 it is mentioned that the rates are valid up to a

deviation limit plus or minus 30% of the total value of work and if the deviation is beyond this limit, the rates are to be discussed and agreed at that

time by MFL and the contractor. These are the salient features as contained in the letter of award. In the GCC it is specifically mentioned under

Clause 16(1) that the Architect shall be the owner's (MFL) representative during the construction period and he shall have the authority to act on

behalf of the owner only to the extent expressly provided in the contract document or otherwise in writing which shall be shown to the contractor.

In Clause 52 it. is specifically mentioned that the Architect's decision, opinion, direction, certificate except for payment (emphasis supplied by me)

with reference to all or any of the matters shall be final and conclusive and binding on the parties and shall be without appeal. These are the relevant

clauses contained in the GCC which are necessary for disposing of this petition.

9. The 1st respondent claimed before the 2nd respondent arbitrator that as per the contract each bill should be recommended by the Architect and

in spite of such recommendation by the Architect and in spite of several reminders and requests the petitioner failed to consider their request. The

1st respondent claimed that the bill submitted for a sum of Rs. 23, 33, 983.28 was already, recommended by the Architect on 2.2.1996 itself.

Likewise, the 1st respondent claimed that the bill value for Rs. 9,30,643/- for extra works was also certified by the Architect and thus a total sum

of Rs. 32, 37, 626.55 is to be paid by the petitioner.

10. The petitioner resisted the claim before the arbitrator relying on para 3.03 of the letter of the award, according to which no escalation is

permissible and the rates agreed upon before starting the work shall be firm and that no escalation of any kind is permissible through out the

pendency of the contract until its completion. They have also stated that Rs. 7,23,273/- had already been paid by the 1st respondent against the

bill amount amounting to Rs. 9,30,643/- for the extra item of work after deducting Rs. 1.65,000/- towards the items not made use of and Rs.

42.370/- being the difference in rates. The claim of Rs. 23,33,983.28 was raised for the manufacture of Stabilised Mud Blocks. According to 1st

respondent, the original specification was to produce Stabilised Mud Blocks using 5% of cement by weight and accordingly 1,10,000 blocks were

manufactured. But it was subsequently changed with 7% cement by weight should be used. Accordingly a bill for the escalation in rates as

recommended by the Architect for an amount, of Rs. 23,33,983.28 and another bill amount of Rs. 9,30,643.27 for extra items of work as certified

by the Architect was submitted. The 1st claim was allowed by the 2nd respondent-arbitrator solely on the ground that the Architect have

recommended the bill relying on Clause 41.1(A) to 41.1(E). The arbitrator has not considered para 3.03 of the letter of award even though it was

very much relied on by the petitioner herein to submit that the 1st respondent is not entitled to price escalation. Even before this Court, learned

Counsel for the petitioner placed his reliance on para 3.03 of letter of award of work and Clause 52 of the GCC to contend that price escalation is

not at all attracted.

11. In this connection, it is useful to refer to para 3.03 of letter of award of work.

Para 3.03: The rates shall be firm and not subject to escalation of any kind, throughout, the pendency of the contract until its completion.

12. From the above para, it is very clear that price escalation is not at all permissible and this para contained in the award of work will form part of the contract as per para 1.02 of the letter of award.

13. Clause 52 of the GCC reads as follows:

The Architect's decision, opinion, direction, certificate (except for payment) with respect to all or any of the matters shall be final and conclusive

and binding on the parties hereto and shall be without appeal, decision, opinion, direction, certificate or valuation of the Architect or any refusal of

the Architect to give any of the same shall be subject to right of the Arbitration and view in the same way in all respect (including the provision as to

opining the reference as if it were a decision of the Architect under the following clause

14. A close reading of the above clause would make it clear that the Architect cannot decide or direct payment being made to 1st respondent. But

the 2nd respondent arbitrator seems to have relied on Clauses 41.1(A) to 41.1(E) of GCC to come to a conclusion that the Architects. have

recommended payment of the bill on the basis of these clauses and on that basis alone in claim No. 1 a sum of Rs. 23,33.983.28 was allowed by

the 2nd respondent-arbitrator. But Clauses 41.1(A) to 41.1(E) deal with loss and expense caused by disturbance of regular progress of the works

and they do not contemplate ascertainment of the amount of expense by the Architect in respect of expenses occurred due to price escalation.

Even otherwise, the Architect cannot disregard para 3.03 of the letter of award of work and recommend for the payment on account of price

escalation. When there is a specific bar in para 3.03 for grant of payment for escalation of any kind, throughout the pendency of the contract, it is

not correct on the part of the 2nd respondent-arbitrator to grant the same disregarding that clause by relying solely on the recommendation of the

Architect. This, in my view, is a serious lapse and infraction committed by the 2nd respondent-arbitrator which can be interfered with u/s 34 of the

Act, 1996. It is not open to the arbitrator to go beyond the contract and grant a claim for payment which is specifically prohibited by a clause in

the contract. Likewise the balance amount of Rs. 2,07,370/- allowed by the 2nd respondent-arbitrator towards the claim of Rs. 9,30, 643/- is also

beyond the scope of the clauses contained in the contract and the same is also to be interfered with by this Court u/s 34 of the Act, 1996.

15. Claim No. 2 is for a sum of Rs. 50 lakhs towards loss of profit and goodwill. Under this claim, a sum of Rs. 2,54,135/- was given by the

arbitrator being the 10% of the pending bill amount of Rs. 25,41,353/-. I have already held that the amount of Rs. 25,41,353/- awarded for the

claim No. 1 is not correct and the same was awarded disregarding the relevant clauses contained in the contract. Therefore, I have to necessarily

hold that the award of Rs. 2,54,135/- granted for the claim No. 2 is also not sustainable. Similarly, the interest at 18% per annum granted by the

2nd respondent-arbitrator on the awarded amount is also unsustainable in view of the findings rendered by me that the entire award amount has

been granted disregarding the relevant and pertinent clause which is a bar for granting the amount for price escalation.

16. In the result, the award of the 2nd respondent-arbitrator dated 1.10.2001 is set aside and the O.P. is allowed. No costs.