
(1975) 12 DEL CK 0005
In the Delhi High Court
Case No : Suit No. 507A of 1973

Metro Electric Co.

APPELLANT

Vs

Delhi Development Authority etc.

RESPONDENT

Date of Decision : 04-12-1975

Acts Referred:

Citation : AIR 1976 Delhi 195 : (1976) RLR 426

Hon'ble Judges : F.S. Gill, J

Bench : Single Bench

Advocate : R.K. Lakhanpal, P.N. Kumar, K. Dayal, R.K. Khanna and Ram Paul, for the Appellant;

Judgement

F.S. Gill, J.

(1) [THE petitioner entered into a contract with the D.D.A. for doing electric work at Interstate Bus Terminus at Delhi in 1970. Work was to be done in 11 months. It could not be finished due to slow progress of building work. Petitioner made 2 claims that due to rise in prices, his rates should be enhanced by 22% and that due to slow progress of building work, his labour remained idle and he should be allowed Rs 16,500.00. The matter was referred to arbitrator who awarded enhancement of rates by 18% and awarded Rs 800.00 for the other claim. Petitioner applied U/Ss. 14 and 17 for making award rule of the Court while respondent applied U/Ss. 30 and 33 for setting aside of the award. After narrating above facts, the judgment para 13 onwards is :

(2) It is submitted by the learned counsel for the respondent that from the very beginning, the Delhi Development Authority had been totally denying the claim of the contractor on the ground that the enhancement claimed was extra-contractual and that, increase, if any, was permissible only under clause 10(c) of the agreement, but that too in the event of the happening of certain contingencies. It is submitted by Shri Keshav Dayal that at best the assertion of the contractor for the increase of contractual rate by 18% in the first instance

and by 22% in the subsequent representations, amounted to an offer, which was never accepted by the petitioner. The original agreement, Therefore, held good as no additional or subsequent agreement had been entered into between the parties. No doubt the prices had shown upward trend during the stipulated period of eleven months and even thereafter, but this did not modify the contract nor it brought about any change in its terms. If there had occasioned a decline in the prices and margin of profits had been higher than what was originally expected, the contract would not have been re-written or modified by bringing down the rates. When an agreement is entered into, the contracting parties are always wide awake and are conscious of the risk involved due to unforeseen circumstances.

(3) Clause 10(c) of the agreement is the main plank of the respondent. For its critical appreciation, it seems expedient to reproduce the same below :

"If during the progress of the works, the price of any material incorporated in the works (not being a material supplied from the Engineer-in-Charge stores in accordance with Clause 10 hereof) and/or wages of labour increases as direct result of the coming into force of any fresh law, or statutory rule or order (but not due to any changes in sales tax) and such increase exceed ten per cent of the price and/or wages prevailing at the time of acceptance of the tender for the work, and contract thereupon necessarily and properly pays in respect of the material (incorporated in the work) such increased price and/ or in respect of labour engaged on the execution of the work such increased wages, then the amount of the contract shall accordingly be varied provided always that any increase so payable is not, in the opinion of the Chief Engineer (whose decision shall be final and binding) attributable to delay in the execution of the contract within the control of the contractor."

(4) This clause of the agreement speaks of increase in the price of the material or wages as a result of some fresh law or statutory rule or order only and does not envisage increase due to other reasons. The kind of increase, which was comprehended by the parties was expressly stipulated and was inserted in the agreement in explicit and absolute terms. Once the firm had signified its acceptance to the contract it was tied down to those terms and could not get back or wriggle out simply because it did not suit its interest.

(5) The contractor has not brought on record any evidence to show that the rise in the prices had occurred on account of any of causes mentioned in clause 10 (C). The terms of contract could not, Therefore, be varied. Any increase in the rates affects the terms of the written agreement which cannot be done unilaterally. The conclusion of an agreement between the parties pre-supposes an absolute and unconditional acceptance of the offer. In other words the parties have to be at consensus ad-idem. But that is not the case here. When an upward trend in the prices of the material started, the contractor seized this opportunity to put forth his claim for higher rates. A mere demand on his part did not automatically amend or supplement the original agreement.

(6) The present is a non-speaking award. It, Therefore, did not contain the reasons for the various findings. It has, however, to be seen whether there is an error of law apparent on the face of the award as alleged by the respondents. Delhi Development Authority had all along been contending that the demand for higher rates due to any increase in the material was beyond the scope of the agreement and, Therefore, extra-contractual. It is submitted by Shri Keshav Dayal that any change in the terms of the concluded contract could not be brought about without the consent of the Delhi Development Authority and that a mere assertion for enhancement of the rates did not confer or vest any legal right in the contractor. The rates had been settled according to the terms embodied in the contract. The scope for increase in the rates of material and of wages of the labour was comprehended in certain circumstances and it was for this reason that clause 10C was inserted in the agreement. This clause was to become operative if there were statutory changes as defined. The record, however, shows that there had been no such increase in the prices. The scope of clause 10C, Therefore could not be enlarged by the Arbitrator. He was to interpret the relevant clause as it stood and could not allow any increase on the ground of equity. His powers were circumscribed by the agreement itself and their transgression amounted to legal misconduct.

(7) Before proceeding further, it may be noted here that the learned counsel for both the sides have unanimously stated that the entire evidence recorded by the Arbitrator and also the documents produced before him be looked into for deciding the various points raised in the controversy. So in view of this joint submission, the said record has been referred to by the parties, where necessary.

(8) Now let us examine the other aspect of the matter. The period to perform the contract was up to 7th February, 1971. Thereafter clause 5 could be invoked by the contractor for extension of time. This clause is in the following terms:

"If the contractor shall desire an extension of time for completion of the work on the grounds of his having been unavoidably hindered in its execution or any other ground, he shall apply in writing to the Divisional Officer within 30 days of the date of hindrance on account of which he desires such extension as aforesaid, and the Divisional Officer shall if in his opinion (which shall be final) reasonable grounds be shown Therefore, authorise such extension of time if any, as may, in his opinion be necessary or proper."

(9) The learned counsel for the contractor has submitted that after the expiry of the contractual period, his clients had not asked for extension of time but the officers of the Delhi Development Authority had forced the firm to proceed with the work. Even before the Arbitrator, the case of the respondent was that the Contractor was bound to complete at the rates mentioned in the agreement. It is thus admitted that the contractor was obliged to proceed with the work although it was demanding an increase of 22% in the rates. This demand of the contractor was rejected by the respondent. It was clearly stated that the increase, if any, could only be allowed within the scope of clause 10C of the agreement. Thus the

demand of 22% increase was a unilateral offer made by the contractor and had never been accepted by the other side.

(10) There is another interesting feature of this case. It is admitted by the learned counsel for the parties that the contract in question had not come to an end, but was still subsisting and alive and that both the parties are bound by its terms. So much so, the contractor has, without any pause continued the execution of the electrification work.

(11) The learned counsel for the contractor has referred to certain settled principles of law, consistently affirmed by the Privy Council and the Supreme Court *A.M. Mair and Co. Vs. Gordhandass Sagarmull*, and has stressed that a Court, while considering an award u/s 30, does not sit in appeal over the award itself and that it has to approach the Award with a desire to support it, as far as possible, rather to destroy it by calling it illegal. It is further submitted that the award should be set aside only if it involves not merely an error of law but when the error of law is apparent on the face of the award. Thus even if the award contains an error of law, it will be valid unless the error is apparent on its face. While applying these principles of law, it cannot be forgotten that each case has to be considered on its own merits. The terms of the present contract had been reduced to writing. Under Article 299 of the Constitution, Government can only be bound by contracts that are entered into in a particular way and which are signed by a proper authority. (See *Thawardas Vs. Union of India*, AIR 1965 S.C. 468. It has been further held in the same case that a person cannot, by a one-sided offer, which is never accepted, particularly when the parties intend that the contract should be reduced to writing, say that the contract has been concluded or varied .

(12) The present dispute centres round the terms of the written contract. Clause 10 (C) of the agreement contemplated that only in the case of a statutory rise in the prices, the contractor would be entitled to enhancement of rates to the extent. The learned counsel for the contractor has not been able to point out any other term in the agreement which empowered the Arbitrator to award higher rates. The mere fact that with the rise in the price of some material, the contractor had claimed higher rate, would not ipso facto entitle him to the same. He had not rescinded the contract at any point to time. He does not ask for damages for breach of any term of the contract, but asserts a claim for a higher rate on extraneous considerations. This does not constitute a ground under the contract and, Therefore, the arbitrator was not legally justified in allowing the enhancement.

(13) The learned counsel for the claimant has tried to rely on section 51 to 55 and 73 and 74 of the Indian Contract Act for claiming damages under the common law, where there had been performance of reciprocal promises. These provisions relate to breach of contract and grant of damages in consequence thereof. In the instant case, no breach of contract has been imputed, but the contractor has tried to get the terms of the existing agreement varied on account

of rise in the prices. Such an enhancement, if allowed, would, in, effect, amount to a new contract. This was not within the power or jurisdiction of the Arbitrator, to do so.

(14) Damage cannot be granted by way of equity or for loss of profits. If any terms of the contract was infringed, in that event, the contractor had to quantify the damages as a result of the breach. In the present case, compensation in the shape of higher rate has been allowed for the work which was yet to be executed. In doing so, the Arbitrator had exceeded his jurisdiction and had thus misconducted himself. This is clearly apparent on the face of the award.

(15) The other objection of the respondent is that the Arbitrator had given a declaratory award by allowing an increase for the work which has yet to be undertaken by the contractor. In answer to this objection the learned counsel for the petitioner as referred me to the head "Declaratory Awards" occurring at page 273 of Russelon Arbitration (Eighteenth Edition). It is

(16) There is no row about the principle enunciated above, but each case has to be considered on its own facts. Declaratory award can be given but in the present case there is a limited scope for allowing an increase over and above the contractual rates. As already stated, clause 10 C of the agreement only envisages an increase if a fresh law or statutory rule or order has been introduced. There is no demand for increase on the basis of any of these counts. So no extra-contractual increase could be permitted, whatever stressing circumstances might be there. The Arbitrator had thus exceeded his jurisdiction and had acted beyond the scope of the agreement. The error of law is apparent on the face of the award. This part of the award, Therefore, cannot be sustained.

(17) Next I advert to claim No. (2). Under this, the contractor had claimed a payment of Rs. 16,500.00 towards infructuous expenditure on establishment which was alleged to have been suffered on account of stoppage of work. The arbitrator had partly allowed this claim by holding that it was justified to the extent of Rs. 8,000.00. There is no error apparent on the face of the award in respect of this claim. Moreover, no infirmity has been pointed out by the learned counsel for the Delhi Development Authority. This part of the award, there fore, has to be maintained.

(18) Out of the two claims allowed by the Arbitrator, the first claim is not sustainable whereas the other claim, partly allowed, has to be maintained. The valid part is easily severable from the rest of the award. So that can be made a rule of the Court. For the reason stated above, the award of the Arbitrator dated 26th October, 1973 suffers from a manifest error apparent ex-facie so far as claim No. 1 is concerned, but there is no such error so far as the remaining part of the award is concerned. I accordingly make the award a rule of the Court, excepting the part which pertains to claim No. 1. Parties are, however, left to bear their own costs, other objections also pressed For decision of the present application which are stated in the application.

(19) It was urged on behalf of the applicants that when the applicants accepted the Award and got the decree passed by consent all that they gave up was their objections, if any, u/s 30 of the Arbitration Act. The objections u/s 33 are independent objections and their scope is much wider than the objections u/s

(20) The argument further proceeded like this : It was submitted that when notice was received of the filing of the Award the objections could have been filed u/s 30 & 33 of the Arbitration Act. The limitation for filing objections u/s 30 was 30 days from the date of the service of the notice of the filing of the Award and limitation for objections u/s 33, if any, had not expired by then, and Therefore, even though the applicant-respondents suffered consent decree they are not debarred from taking objections which are open to them u/s 33 of the Arbitration Act and have the question of existence or validity of the Arbitration agreement or the Award or their effect determined subsequently.

(21) I am afraid, I will not be able to agree with this submission. If a party suffers a consent decree or suffers a decree after contest, he can no longer have the effect of the arbitration agreement or the Award determined or challenge its existence, The scheme of the Arbitration Act is that so long as the Award has not become a decree after contest or consent, any party to the arbitration agreement can have various reliefs as provided u/s 30 and/or Section 33 of the Arbitration Act. Till the Award becomes rule of the court the party can have the existence or validity of arbitration agreement determined by a petition u/s 33. Even after the Award is made, any party to the arbitration agreement can have both the existence or validity of the arbitration agreement or the Award determined, but after the Award, in pursuance of arbitration agreement, is made a rule of the court by consent and/or by contest, no party to the arbitration agreement or the Award can challenge its existence and/or validity by way of an application in the suit or independently u/s 33 of the Arbitration Act. If the decree is a nullity in the sense that it was passed by a Court without inherent jurisdiction it may be possible to have it challenged under the provisions of Section 47 of the CPC whenever and wherever it is sought to be enforced against the party. But where the decree is passed after consent or contest, based on an Award, by a Court, no application u/s 33 of the Arbitration Act is competent.

(22) Learned counsel for the applicant relied on the division Bench judgment of Patna High Court in Basant Lal Vs. Surendra Prasad and Others, . The basic point of distinction of that case with the present case is that there the judgment-debtor was throughout exparte and the decree was passed neither on consent nor after contest and, Therefore, the observations in the said case are of no help to the present applicant- respondent.

(23) The other case relied upon by the learned counsel was Waverly Jute Mills Co. Ltd. and another Vs. Raymon and Co. (India) Pvt. Ltd. AIR 1953 SC 90. This case, again, has got no relevance whatsoever to the maintainability of Section 33 petition after consent decree is passed.