(2001) 04 DEL CK 0103

In the Delhi High Court

Case No : Suit No. 1412-A of 1997

M/s Duggal Construction (India) Ltd. APPELLANT

Vs

M/s Indian Farmers Fertilizers Cooperative Ltd. RESPONDENT

Date of Decision : 25-04-2001

Acts Referred:

Arbitration Act, 1940 — Section 29, 30, 33
Contract Act, 1872 — Section 1, 25, 38, 73
Interest Act, 1978 — Section 3, 3(3)

Citation : (2001) 04 DEL CK 0103

Hon'ble Judges : Madan B. Lokur, J

Bench : Single Bench

Advocate : Mr. Rajesh Lakhanpal, for the Appellant; Mr. V.K. Makhija Mr. Manoj Verma and Mr. Akshay Makhija, for the Respondent

Judgement

Madan B. Lokur, J.—The Respondent has challenged an Award dated 6th June, 1997 by filing objections under Sections 30 and 33 of the Arbitration Act, 1940. The Award is in relation to two contracts being Contract Nos. 117 and 117-A dated 8th April, 1985 and 25th May, 1985 respectively.

2. As per the contracts, the Petitioner was required to construct quarters for the Respondents Fertilizer Township in Aonla, District Bareilly (U.P.). The contract period was 18 months, but there was a delay in completion of both the contracts. The delay was 16 months and 12 months respectively.

3. Disputes having arisen between the parties, they were referred to two learned Arbitrators for being resolved. Hence the Award.

4. The following issues were framed by a learned Single Judge of this Court on 19th January, 1998 in respect of the objections filed by the Respondent:-

"1. whether the Award dated 6th June, 1997 is liable to be set aside on the basis of objections filed under Sections 30 and 33 of the Arbitration Act, 1940 on behalf of the Respondent?

2. Behalf.

5. Learned counsel for the parties made their submissions on 1st, 5th, 7th, 8th and 9th March, 2001 when judgment was reserved. Learned counsel for the Respondent raised three principal objections to the Award.

6. It was firstly contended that the learned Arbitrators had awarded interest upon interest. It was said that this is contrary to the provisions of Section 3(3)(c) of the Interest Act, 1978. An objection was raised to the following conclusion:-

"The Claimant is also entitled to interest at the rate of 18th per annum on this amount which works out approximately to Rs. 1,87,20,000/-. Thus the total claim to which the claimant is entitled to works out to Rs. 3,17,43,790/-. The above interest has been calculated from the date we entered into the reference till the date of the award. In addition he will also be entitled to interest on the entire amount of Rs. 3,17,43,790/- from the date of the award till the date of payment".

7. Reliance was placed on M.G. Kapoor (Lt. Col.) Vs. Union of India and Others, . This decision has no reference to proceedings under the Arbitration Act, 1940 and is, Therefore, inapposite.

8. Learned counsel for the Petitioner relied upon the conclusions arrived at on Claim No. 13 (contract No. 117-A) and Claim No. 12 (in contract No. 117). This is what the learned Arbitrators held:-

"Claim No. 13 (contract no. 117-A)

Interest has been claimed at the rate of 18% per annum for the claims found due. The claimant is entitled to interest from the date of reference to the arbitration i.e. 10.5.1989 till the date of the award, i.e. 6.6.1997, the rate of which will be determined at the time of granting relief.

Claim No. 12 (contract No. 117)

Claimants have prayed that they may be allowed interest at the rate of 18% per annum on the amount actually found due and payable from the date these were in fact due and payable. We are of the view that the claimant is entitled to interest but the interest can only be allowed from the date when the arbitration proceedings were started i.e. 10.5.1989 and will be calculated up to the date of the award, i.e., 6.6.1997, and the rate of interest will be determined at the time of granting relief".

9. The Supreme Court held in Oil and Natural Gas Commission Vs. M.C. Clelland Engineers S.A., that in an arbitration, a claim for interest is an independent claim. Awarding of interest on such a claim is the same as awarding interest on a principal amount. Paragraph 4 of the Report is relevant and this reads as follows:

"There cannot be any doubt that the arbitrators have powers to grant interest akin to Section 34 of the CPC which is the power of the Court in view of Section

29 of the Arbitration Act, 1940. It is clear that interest is not granted upon interest awarded but upon the claim made. The claim made in the proceedings is under Two heads - one is the balance of amount claimed under invoices and letter dated 10.2.1981 and the amount certified and paid by the appellant and the second is the interest on delayed payment. That is how the claim for interest on delayed payment stood crystallized by the time the claim was filed before the arbitrators. Therefore, the power of the arbitrators to grant interest on the amount of interest which may, in other words, be termed as interest on damages or compensation for delayed payment which would also become part of the principal. If that is the correct position in law, we do not think that Section 3 of the Interest Act has any relevant in the context of the matter which we are dealing with in the present case. Therefore, the first contention raised by Shri Datta, though interesting, deserves to be and is rejected."

10. In view of the clear decision of the Supreme Court, it has to be held that the demand for interest is an independent claim. If interest is granted on this independent claim, there is no violation of the Interest Act, 1978. This objection is, Therefore, rejected.

11. The next objection is that the learned Arbitrators violated ?he principles of natural justice. In this regard it was contended there was an inordinate delay of more than a year between hearings. As a result, no one could remember what was argued such a long time back. On this ground, it was submitted that the learned Arbitrators should re-hear the matter and then render a decision. It was also submitted that the learned Arbitrators refused to take the written submissions of the Respondent on record, thereby causing prejudice to it.

12. The delay in the hearings is entirely attributable to the Respondent. It appears from the record that the Petitioner commenced its submissions on 25th May, 1995 and continued till July, 1995. The Respondent commenced its submissions in September, 1995. Sometime in March, 1996, the Respondent declined to extend time to the learned Arbitrators to make the Award. This led to the Petitioner filing a petition in this Court for extension of time. This was in March, 1996. In July, 1996, the Respondent filed a petition for revocation of authority and removal of the learned Arbitrators. A learned Single Judge of this Court (by an order dated 11th February, 1997) granted time to the learned Arbitrators to publish their Award within two months.

13. The order sheet in the arbitration proceedings thereafter is rather interesting. The Respondent applied for an adjournment on the ground that an appeal had been filed against the order of the learned Single Judge. An adjournment was granted on 6th March, 1997. Thereafter, another adjournment was granted on 13th March, 1997 on the request of learned counsel for the Respondent. A third adjournment was granted to the Respondent on 17th March, 1997. Finally, on 18th March, 1997 an order was passed by the learned Arbitrators, the relevant extract of which is as follows:-

"An application was moved requesting that we should permit them to file written arguments on or before 3.4.1994. After hearing the parties we rejected this application mainly for the reasons that earlier both the parties had been making oral submissions and we were still ready to give them whatever time they wanted for making their submissions but there was no occasion for written arguments"

"The respondents have been asked to continue their oral arguments but they have said that they are not making any further oral submissions since everything is on record. In view of this assertion...., we have no option but to close their arguments..."

14. It appears, Therefore, that the learned Arbitrators were prepared to hear (or re-hear) the respondent but it chose not to address oral arguments. Consequently, it is quite clear that the Respondent was given an opportunity to make oral submissions, but it chose not do so. There is no denial of natural justice in this regard.

15. As regards filing of written submissions, it cannot be anybody''s case that there is a right to file written submissions, and if this is denied, it violates the principles of natural justice.

16. Reliance by learned counsel for the Respondent on Income Tax Appellate Tribunal, Hyderabad Special Bench, Hyderabad Vs. Dy. Commissioner of Income Tax (Assts) III, Hyderabad, A.P. and Others, is misplaced. That decision was rendered on the peculiar facts of that case (paragraph 10 of the Report). Moveover, the question raised before the Supreme Court was:-

"Point I

Whether the Special Bench of the Income Tax Appellate Tribunal had committed breach of principles of natural justice and had denied reasonable opportunity to the Income Tax Department to put forward its case in the appeals taken up for decision by the Special Bench?"

16. While dealing with this question, the Supreme Court did not "deem it fit to pronounce upon that question finally." In any case, no rule was laid down that in case written submissions are not permitted to be filed, there is a violation of the principles of natural justice. This objection has, Therefore, to be rejected.

17. The bone of contention is really with regard to the grant of escalation charges called damages awarded by the learned Arbitrators. According to learned counsel for the respondent the Petitioner was not entitled to get anything over and above 5% of the contractual amount towards escalation charges. According to learned counsel for the Petitioner, his client was entitled to escalation charges of 5% of the contractual amount during the contractual period, and thereafter damages as per the Contract Act, 1872.

18. The relevant clauses of the Contracts entered into between the parties are

reproduced hereinbelow. For the sake of convenience, the Contract originating with the letter dated 8th April, 1985 is referred to.

19. The contract price is defined in Clause 1 of the letter dated 8th April, 1985 as follows:

"1. The Contract Price:

The Contract Price is Rs. 1,86,77,126.00 (Rs. One crore eighty six lakhs seventy seven thousand one hundred twenty six only). This price is subject to escalation as per escalation formula stipulated in our NIT.

20. The period of the Contract is defined in Clause 2 of the said letter as follows:

"2. Period of Contract.

The entire job has to be completed within a period 18(eighteen) months from the date of acceptance of this Letter of Intent. Any delay in completion of the job will attract liquidate damages at a rate of 1/2% (half a percent) of the contract price for each week of delay or part thereof, subject to a maximum of 5% (five percent) of the Contract price."

21. Part II of the Contract details the Conditions of Contract. This defines the date of completion in Article 1(f) as under:

"Article 1 - Definitions.

(a) to (e) xxx xxx xxx

(f) Date of Completion means the date specified in the First Schedule hereto or such later date as may be agreed to in writing from time to time by the owner."

22. The date specified in the First Schedule is "18 months from the effective date of Contract."

23. Postponement of the completion date or the Force Majeure clause is Article 25 of Part II of the Contract. Article 38 deals with "Prices" and this reads as follows:

"All prices shall be fixed for the duration of the Contract and shall not be subject to escalation of any description including those on account of delays due to Force Majeure, unless stated otherwise in the First Schedule".

24. The escalation clause in Clause 3.0 of the First Schedule to the Contract. The relevant portion of this clause reads as follows:

"3.0 Escalation.

A. The payment for escalation shall be payable as per the formula given hereinunder:-

i) Escalation for labour component.

x x x x x ii) Escalation for materials procured by Contractor:-

x x x x x The contractor shall not specify any other formula for escalation referred to above. If escalation coverage by above formula is not felt adequate by the contractor, the same shall be covered by the contractor in his quotation/ lump sum amount quoted, as the case may be.

However, the total escalation on all items together will be limited to a maximum ceiling limit of 5% of the contract value. The ceiling for escalation as asked for will be taken for loading the contractors bid.

Bill for escalation will be submitted every month if there is any change in wages of labour or whole Sale Price Index afore-mentioned in Sub-clauses A(i) and A(ii)".

25. Clause 6 of the First Schedule to the Contract is also relevant and this reads as under:-

"6. LIQUIDATED DAMAGES FOR LATE COMPLETION:

In case of delay in completion of work the owner shall deduct the liquidated damages at the rate of 1/2% of Contract Price for each week of delay or part thereof subject to a maximum of 5% of Contract Price".

26. The learned Arbitrators dealt with this issue in the following manner:-

"The next important question to be decided is as to whether the claimant is entitled to any amount in respect of labour and material escalation for the spill over period and the answer to this question would depend on the view we take with regard to liability of the party for causing delay in the execution of the project."

27. It was then said:-

"The Respondent have strenuously contested the claim for escalation for the spill over period on the ground that the demand was vocative of the terms of the contract and was not, Therefore, admissible. The contract had provided for a limit of 5% of the contract value for any claim under this head and finding support from this clause it was contended that the limit of 5% of the contract value would continue to be operative even during the period beyond the contract period. The claimants have tried to meet this objection by contending that their claim for escalation was in fact a claim for damages for the loss suffered by them because of the breach of obligation on the part of the Respondent which had caused delay in the execution of the project. It is further contended that the amount of escalation which remained uncontroversial was in fact the measure of damages to compensate the loss suffered under this head."

28. On these contentions, the learned Arbitrators posed the following question:-

"Respondents have relied heavily on the rulings which emphasise that the parties are bound by the terms of the contract and cannot be permitted to wriggle out of it merely because they have suffered a loss due to rise in prices or other similar causes. The proposition of law enunciated in these cases in unexceptionable but the argument which we are considering is somewhat different. The question is not whether the term relating to ceiling of 5% of the contract value which could be claimed as escalation is binding between the parties or not but whether this term continues to be attracted even during the spill over period." (emphasis supplied)

29. The learned Arbitrators then stated their conclusions in the following words:-

"In our case there is no specific clause which prohibits the contractor from claiming compensation in a situation where the contract could not be performed within the stipulated period due to the fault of the owner. In our opinion in such a situation the contractor is entitled to escalation cost for performing the contract during the extended period. The relevant clause in this contract is only an enabling clause to allow the contractor to claim escalation during the contract period though that is limited to 5% of the contract period, but there is no prohibition that if the owner has caused delay and has thereby created a situation where the contractor had to incur extra heavy expenditure, he could not claim the same as damages." (emphasis supplied)

30. What was, Therefore, accepted by the learned Arbitrators was that the petitioner was not entitled to more than 5% escalation for the period specified in the contract. But, for the extended period or spill over period, the escalation clause did not apply. The claim was really for escalation and it was based on the admitted escalation formula. It was, however, styled by the Petitioner as damages or compensation. The real issue, Therefore, is whether such a claim was admissible. According to the learned Arbitrators, the answer to this is in the affirmative, but the admissibility is restricted only to the period beyond the original contract period.

31. Frankly, I think that the conclusion arrived at by the learned Arbitrators is not sustainable in law. I find no rationale for picking up one clause of the contract and throwing it out of the window, just like that. Why not a handful of other clauses as well? Why not the whole contract?

32. But be that as it may, two questions need to be resolved to settle this controversy. Firstly, does the escalation clause continue beyond the original contract period? For this, one has to look at the various stipulations.

33. As per Clause 1 of the letter dated 8th April, 1985, the contract price is fixed but it is subject to the escalation formula. the extent of damages that the Respondent could claim was subject to a maximum of 5% of the contract price as per Clause 2 of the letter dated 8th April, 1985 and Clause 6 of the First Schedule to the contract. The total escalation that the Petitioner could claim on all items was limited to 5% of the total value of the contract. The emphasis in Clause 2 of the letter dated 8th April, 1985, Clause 6 of the First Schedule to the contract and the escalation clause is on the contract value or contract price. The

time limit for performance of the contract does not seem to be relevant. It is the contract value or contract price which is material. This is quite obvious because it is not possible to measure time in percentages.

34. I am, Therefore, of opinion that regardless of how much time it would take to perform the contract, the Respondent would be entitled to liquidated damages limited to 5% of the contract value. Similarly, the Petitioner would be entitled to 5% escalation of the contract value and nothing more.

35. Whether such an interpretation to the stipulations is permissible in law is clear from the decision of the Supreme Court New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation,

36. A reading of paragraph 9 of the Report shows that the Appellant therein also made a claim on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. This was resisted by the Respondent therein. The Supreme Court examined the relevant stipulation and concluded that no escalation could be granted till the completion of the work. The Supreme Court endorsed the view of the Division Bench of the High Court that the "appellant could not have claimed any amount on account of escalation in the cost of construction carried on by him after the expiry of the original contract period." The Supreme Court then held:

"We are of the opinion that the learned single Judge was not right in holding that the said prohibition is confined to the original contract period and does not operate thereafter. Merely because the time was made the essence of the contract and the work was contemplated to be completed within 15 months, it does not follow that the aforesaid stipulation was confined to the original contract period. This is not a case of the arbitrators construing the agreement. It is a clear case of the arbitrators acting contrary to the specific stipulation/condition contained in the agreement between the parties".

37. Two things stand out from this decision of the Supreme Court. Firstly, one has to construe the stipulation in the contract and secondly, depending on the interpretation, even if time is of the essence of the contract, the stipulation will not be confined to the original contract period.

38. I have already concluded, on the basis of the stipulations in the contract, that the Petitioner was not entitled to anything over and above 5% of the contract price regardless of the time it took to perform the contract. In view of the decision of the Supreme Court, it is irrelevant whether time was or was not the essence of the contract.

39. Learned counsel for the Petitioner contended, relying upon Article 38 of the contract dealing with "Prices" that the duration of the contract is different from the duration of the work. According to him, duration of the contract means the period of 18 months during which the work has to be completed and any additional period on account of force majeure.

40. I am afraid that it is not possible to accept this interpretation given by learned counsel for the Petitioner. The common English meaning of ''duration'' is relating to a period of time. Black''s Law Dictionary 7th Edition defines duration as the length of time something lasts, or a length of time or a continuance in time. The duration of the contract must necessarily mean the period during which the contract subsists. It cannot be different from the duration of work. Otherwise, if what learned counsel for the Petitioner contends is correct, then after the duration of the contract as defined by him, how can work go on de hors the contract. This is simply not possible. Consequently, it has to be held that the duration of the contract is the entire period during which the contract subsists which may be beyond the period stipulated in the contract for the completion of the work.

41. This is also clear from Clauses 2 of the letter dated 8th April, 1985 requires the entire job to be completed in 18 months and "Any delay in completion of the job will attract liquidated damages..." This indicates to me that the entire contract was to run till the completion of the job, and not only for 18 months.

42. The second question is whether the learned Arbitrators could award escalation in the garb of damages. I think the law is very well settled in this regard - what cannot be done directly, cannot be done indirectly. The claim made by the Petitioner was really one for escalation and was based on the admitted escalation formula. The learned Arbitrators understood the claim as one for escalation and they posed the question to be answered by them as one relating to escalation. They decided the claim as one for escalation but chose to style it as damages or compensation u/s 73 of the Contract Act, 1872. I am afraid this was not permissible. This was completely contrary to the agreement between the parties, as the Supreme Court says.

43. A somewhat similar situation arose in Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, . The contractor had alleged that the contract could not be completed within the original contract period because of gross delay by the State in the allotment of work and discharge of its obligations under the contract. The contractor advanced claims for compensation. The same was partly allowed by the learned Arbitrator. The Supreme Court held that the learned Arbitrator had misconducted himself in allowing the claims without deciding the objection of the State that in view of specific clauses in the contract, the contractor was not entitled to claim for extra cost. To the same effect is Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, .

44. In the present case, the learned Arbitrators did decide the objection raised by the Respondent but, wrongly, to my mind. the question is whether I can substitute my opinion for that of the learned Arbitrators. Where two views are plausible, the Court would not substitute its opinion for that of the learned Arbitrators. But where it is apparent, not by construing the contract but by merely looking at it that the learned Arbitrator travelled beyond the contract then it is an error of jurisdiction going to the root of the award. (See Sudarsan Trading

Co. Vs. Government of Kerala and Another, Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , Food Corporation of India Vs. Joginderpal Mohinderpal, and The Municipal Corporation of Greater Bombay vs. Thermal Engineering Corporation, Bombay & Others, 1997 (2) Arb.LR 361.

45. It appears to me that the stipulations in the contracts in hand admit of only one interpretation on their plain reading. On going through the Award, it seems that the learned Arbitrators also realised that the prohibition clause had only one possible meaning. They, however, chose to circumvent that clause by adopting a reasoning which was inconsistent with the law.

46. In such a situation, the Supreme Court tells us in Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, that the law on the subject is in paragraph 44 of the Report. The relevant conclusions laid down by the Supreme Court are as follows:-

"(a) to (f) xxx xxx xxx

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out of prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement.....

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority of misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law."

47. Learned counsel for the petitioner sought to distinguish all these decisions on the ground that the facts of these cases were different and the stipulations therein were different and unambiguous. Of course, the facts of each case are bound to be different. The stipulations in most contracts will also be different,

except perhaps in standard Government contracts. It is for this reason that I have considered the stipulations appearing in the contracts at hand. The legal consequences follow from the decisions of the Supreme Court. There is, Therefore, not much to be said on this argument of learned counsel.

48. Learned counsel for the petitioner relied upon M/s Salwan Construction Company vs. Union of India, 1997 (1) Delhi 748. In this case, there was no escalation clause in the contract. The question arose whether the contractor could claim damages for breach of the contract. This question was answered in the affirmative. I do not see how this decision is applicable because in the case at hand, there is an escalation clause which, Therefore, prohibits the Petitioner from claiming damages.

49. Reliance was also placed upon M/s Metro Electric Company vs. Delhi Development Authority, AIR 1980 Delhi 266. In this case, the contractor had claimed damages and the Respondent therein sought to deny the claim of damages by relying upon Clause 10-C of the contract. The Division Bench held, agreeing with the learned Arbitrator, that Clause 10-C was not applicable. In this view of the matter, the claim for damages was allowed.

50. The Division Bench dealt with another contention based on Clause 5 of the contract therein and cited Hudson''s Building and Engineering Contracts, 9th Edition, page 492 wherein it is stated as follows:-

"Where the cause of delay is due to breach of contract by the employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of the clearest possible language, deprive the contractor of his right to damages for the breach."

51. The converse would be equally true, namely, that the language of the contract can deprive the contractor of his right to claim damages.

52. Finally, learned counsel for the Petitioner relied upon P.M. Paul Vs. Union of India (UOI), . This was also a case where there was no escalation clause. However, the Supreme Court (a Bench of two Hon''ble Judges) held in paragraph 12 of the Report that "Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract." On this basis, the Supreme Court accepted the conclusion of the learned Arbitrator that 20% escalation could be granted. This appears to have been overruled in State of Orissa Vs. Sudhakar Das (Dead) by Lrs., wherein the Supreme Court (a Bench of three Hon''ble Judges) held that "In the absence of any escalation clause, an Arbitrator cannot assume any jurisdiction to award any amount towards escalation." In any case, it is not necessary for me to resolve this dichotomy of views because in the case at hand there is an escalation clause which I have interpreted to mean that the Petitioner cannot claim anything over and above the amount mentioned in the escalation clause.

53. Under the circumstances, the Award of the learned Arbitrators, in respect of

the conclusion that the Petitioner was entitled to claim compensation or damages for breach of contract for the period beyond the original contract period, has to be set aside as being without jurisdiction. It is so directed. There will also be a consequential adjustment in the amount of interest payable to the Petitioner. I am sure the parties can sort out the quantum of interest due to the Petitioner on this basis.

54. Except to the extent mentioned above, the rest of the Award is made a rule of the Court.

55. Parties to bear their own costs.

