
(1980) 01 DEL CK 0031

In the Delhi High Court

Case No : F.A.O. (OS) No. 27 of 1976

M/s. Metro Electric Co. New Delhi

APPELLANT

Vs

Delhi Development Authority, New Delhi

RESPONDENT

Date of Decision : 21-01-1980

Acts Referred:

Citation : (1980) 01 DEL CK 0031

Hon'ble Judges : S.B. Wad, J;Rajinder Sachar, J

Bench : Division Bench

Advocate : R.P. Lakhanpal and Rajesh Lakhanpal, for the Appellant; S.N. Chopra, Raf Paul and R.K. Khanna, for the Respondent

Final Decision : Allowed

Judgement

S.B. Wad, J.—This is an appeal against the order of the learned single Judge of this court (Gill, J.) dated 4th Dec. 1975 holding that there was a "manifest error apparent ex facie" so far as claim No. 1 of the appellant/contractor. The learned Judge further held that the award in respect of other claims of the contractor should be made a rule of the court. The appellant-contractor contests part of the order of the learned single Judge which rejects claim No. 1. Claim No. 1 was decided by the Arbitrator as follows :?

The claimants are entitled to an enhancement of 18% over and above their accepted tendered enhancements on the quantum of work executed after December 1970.

2. The learned single Judge held that the award in regard to claim No. 1 was contrary to Cl. 10C of the agreement between the parties, that the error was apparent on the face of the award and that the Arbitrator committed misconduct in granting the said claim to the appellant which was beyond his jurisdiction.

3. The first contention raised by the appellant is that the finding of the learned single Judge that there was error apparent on the face of the award and that the arbitrator had committed a misconduct was contrary to S. 30 of the Arbitration

Act. He has relied upon the decisions of the Supreme Court in *Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, and Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI), New Delhi, .* His submission in short is that the award in question being a non-speaking award and since clause 10C of the contract was not incorporated in the award, the learned single Judge was not right in holding that there was an error apparent on the face of the award. Even if it is assumed that the Arbitrator granted the claim contrary to the provisions of Cl. 10C, the award cannot be assailed. In the *Allen Berry* case the Supreme Court has summarised the law on the point as follows:?

The question whether a contract or a clause of it is incorporated in the award is a question of construction of the award. The test is, does the arbitrator come to a finding on the wording of the contract. If he does, he can be said to have impliedly incorporated the contract or a clause in it whichever be the case. But a mere general reference to the contract in the award is not to be held as incorporating it. The principle of reading contracts or other documents into the award is not to be encouraged or extended (see *Babu Ram v. Nanhemal*, C A. No. 107 of 1966, D/- 5-12-1968 (SC) Reported in 1969 SCD 262. The rule thus is that as the parties choose their own arbitrator to be the judge in the dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon the law or the facts. Therefore, even when an arbitrator commits a mistake either in law or in fact in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake.

4. It is true that the award in question is a non-speaking award and the learned Arbitrator has not given any reason as to why he permits the claim in the face of Cl. 10C. However, two special facts of the case must be taken into account. The first is that to the several representations of the appellant the respondent had consistently replied that the claim was not permissible under Cl. 10C of the contract Secondly, before the learned single Judge both sides had 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. On the facts of this case there is no error committed by the learned single Judge in looking to Cl. 10C, as that was the principal controversy between the parties. However, we need not express any final opinion on this question as we have come to the conclusion that the learned single Judge was in error in his interpretation of Cl. 10C of the contract and his further finding regarding the error apparent on the face of the award and the consequent misconduct committed by the Arbitrator in allowing the claim.

5. Clause 10C of the contract reads as follows:?

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 store in accordance with Cl. 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 or 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) attribution to delay in the execution of the contract within the control of the contractor.

The clause is applicable if during the progress of the work the prices of material or labour rise. Only such increase is permissible which is beyond 10% of the original cost wages. Such rise in price/ wages must be certified by the Chief Engineer be not attributable to delay on the part of the contractor. The decision of the Chief Engineer as regards delay on the part of the contractor is final and binding.

6. In order to appreciate the application of clause 10C it is necessary to examine the background in which the claim was preferred by the appellant and awarded by the Arbitrator. It may be noted here, that according to the terms of the contract, the contractor is bound to accept the Chief Engineer or the D.D.A. as the Sole Arbitrator. In fact, the present award is rendered by Shri K.B. Menon, the then Chief Engineer of the D.D.A. By means of an agreement dated 26th Feb. 1970 between the appellant/Contractor and a D.D.A., a contract of the value of Rs. 5,17,990/- was given to the Contractor for electrification of the Interstate Bus Terminus, Kashmere Gate. The electrifications consisted of internal wiring, telephones, conduit and public address system. The work was to commence on 8th Mar. 1970 and was to be completed in eleven months. It is admitted position that till 7-2-1979, the date before which the contract was to be completed, the Civil Engineering construction of the Bus Terminus was not simultaneously completed. The site was not thus made available to the contractor by the D.D.A. and, therefore, by Feb. 1971 work (only) to the extent of Rs. 13,500/- could be undertaken by the contractor. Several representations were made by the contractor from time to time complaining about non-availability of the site, the rising prices and the infructuous expenditure which he required to incur he contractor admittedly informed the D.D.A. from time to time that he would be able to complete the work only after D.D.A. sanctioned an increase of 22% over and above the contract price. It may be mentioned here that the practice followed by the D.D.A. is to treat the C.P.W.D. manual rates as the base price and tenders are invited on the basis of the percentage increase on the said base rates. This is the mode of the settlement of price followed by the D.D.A. generally and the same was followed in the present case also. The last letter of the Contractor is of 6th Feb. 1972 (referring to the earlier letters) whereby the contractor claimed additional 22% rate by way of the general damages. The contractor also brought to the notice of the D.D.A. that a D.D.A.'s contention

that no such claim was permissible under clause IOC of the Act, was wrong. On 23rd Dec 1971 the D.D.A. informed the contractor that he should immediately resume the work within seven days or otherwise the work would be executed at his risk and cost under Cl. 3 of the contract. In the further dialogue between the parties it was agreed that the contractor's claim for the damages in the nature of enhanced rate of 22% over and above the quoted rates should be referred to the arbitration and that the contractor should resume the work. Accordingly, the work was started by the contractor. The contractor submits that he had to start the work because of the said threat of the D.D.A. to get the work done from other contractor at the risk and cost of the appellant. The matter was thereafter referred to the Chief Engineer D.D.A. for his arbitration. In a statement of claim, the contractor referred some other claims besides the principal claim with which we are concerned here.

7. The learned Arbitrator called upon the contractor to produce the vouchers showing increase in the price and also to file documentary evidence to support their claim of the infructuous expenditure in idling of the staff and trained labour. After the contractor filed the vouchers and documents in support of his claim, the learned Arbitrator directed the Executive Engineer (of the D.D.A.) to scrutinise the vouchers for increased rates and the documents submitted by the contractor. The report was filed by the Executive Engineer on 23rd Oct. 1973. In his report the Executive Engineer testified that the percentage of increase worked out by the contractor to the extent of 24.56% was correct. The matter was heard by the learned Arbitrator on number of days. On 26th Oct. 1973 the learned Arbitrator gave his award granting the contractor's claim partially i.e. only to the extent of 18% rise.

8. The facts stated above would make it clear that the increased rates claimed by the contractor were in respect of the work which he was to carry on after the initial contract period of eleven months. It is also clear that it was because of the fault of the D.D.A. in not handing over the site to the contractor that the contractor was unable to complete the work. There was thus, breach of contract by the D.D.A. and the contractor was entitled to the damages. However, since it was agreed by the parties that the work should be taken up by the contractor from where he had to stop and it was simultaneously agreed by the parties that the arbitrator (the Chief Engineer of the D.D.A.) would decide the quantum of damages in the form of the increased rates, the application of Cl. 10C of the agreement was really extraneous and irrelevant. Clause 10C presumes that the contract is completed during the agreed period of the contract and is applicable only during the progress of the work within that period. In spite of this the D.D.A. consistently tried to negative the contractor's claim by placing reliance on Cl. 10C. Indeed, in their written reply to the statement of claim they averred the same contention before the learned Arbitrator. The Arbitrator who is the Chief Engineer of the D.D.A. is more familiar with this clause of the contract than anybody else as he is required to apply this clause almost daily in the contracts entered into by the D.D.A. The award is not a speaking award but it would not

need too much of speculation to hold that the Arbitrator did not find Cl. 10C applicable to the facts of the case before him. On the facts of the case we are of the opinion that Cl. 10C has no application.

9. It is submitted by the respondent that under Clause 5 of the Agreement, the appellant could have asked for the extension of time and the present case would really be covered by such as extension of time. It is then contended that the contractor cannot ask for the damages as this is merely a case of the extension of time. No such point appears to have been taken before the learned single Judge and there is no finding recorded on the question of application of Cl. 5 by the learned single Judge. In the first place, the present case cannot be described as a case of extension of time within the meaning of Cl. 5 of the Agreement Cl. 5 reads as follows:?

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 Division Officer within 30 days of the date of hindrance of account of which he desires such extension as aforesaid, and the Division 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.

10. The present case is a case of the total failure of the D.D.A. in completing the civil construction, which was precondition for any electric installations to be made by the contractor, This is not a case of minor hindrance of impediments which alone are taken care of by Cl. 5. Even otherwise several representations made by the contractor regarding the delay in handing over of the site, had not produced any result. Secondly, even assuming that Cl. 5 is applicable in the present case that would not stand in the contractor's way in claiming damages, as Cl. 5 does not bar any such claim, either expressly or by implication. Hudson's Building and Engineering Contracts (Page 492, 9th Edition) states the principle 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.

11. In the result we allow the appeal. We set aside the order of the learned single Judge in regard to claim No. 1 and make the entire award including claim No. 1 for 18% rise, the rule of the court. The appellants are entitled to costs throughout.