(1999) 09 MP CK 0046

In the Madhya Pradesh High Court

Case No : C.R. No. 2136 of 1995 (J)

M/s Saluja Construction Co APPELLANT

Vs

State of M.P. RESPONDENT

Date of Decision : 07-09-1999

Acts Referred:

Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 — Section 19

Citation : (2000) 1 MPJR 618

Hon'ble Judges : Usha Shukla, J;Miss, J;D.M. Dharmadhikari, J

Bench : Full Bench

Advocate : Ravindra Shrivastava with Sanjay K. Agrawal, for the Appellant; N. Nagrath, Panel Lawyer For State, for the Respondent

Judgement

D.M. Dharmadhikari, J.

This revision u/s 19 of M.P. Madhyastham Adhikaran Adhiniyam, 1983 has been preferred by the Contractor against the award dt. 7.9.95 passed by the M. P. Arbitration Tribunal whereby his claim has been partly disallowed.

The contractor was awarded work of construction of different types of residential quarters numbering 438 at Narbada Nagar in District Khandwa. An agreement was executed on 28.2.83, between the parties. The date of issuance of work order was 28.3.83 and the stipulated period of contrct was 12 months including rainy season.

It is not disputed that the department granted as many as three extensions and the work was completed on 31.3.87 within a period of additional 37 months.

On the claim submitted by the contractor for award of damages and compensation of on overheads the Tribunal by its award held that the delay in completion of the contract was due to fundamental breaches on the part of the department such as in making available the work site in piece-meals and in intervals, delay in taking decision in change of quarry for manufacture of bricks, delay in making available the drawings.

On the question of liability of the Department to compensate the contractor for delay, the Tribunal held that for all the 37 month''s delay the contractor cannot be compensated. It is held that the department is responsible to compensate for delay on its part only to the extent of 14 months. In arriving at the above finding the reasons given by the Tribunal are to be found in paragraph 10 of the award. The reasons given are that the due date for completion was 27.2.84 and the entire work site was handed over on 8.8.84. By that time the contractor had been paid his 18th running bill in the value of Rs. 48,40,906/-. With the progress of work for the site made availble to the contractor, he would have required another 8.3 months for completing the whole work. The contractor thus suffered, if at all, any loss, which needed to be compensated, is only between 27.2.84 i. e. the due date for completion of the contract and 8.8.84 which was the date on which the whole work site was made available to him. Work site was thus made available after five months'' delay and the remaining amount of work would have required another 8.3 months for the contractor. Thus the contractor was found liable to be compensated for 14 months delay in the above respect on the part of the department.

On the head of claim towards ''overhead expenses'' the Tribunal in paragraph 22 of its award has given a table showing the calculation and on the said head a sum of Rs. 6,00,000/- has only awarded.

On the head of ''loss of profit'' relying on two decisions of this Court in the case of State of M.P. v. M/s Recando Ltd. (1993 ATLR 557) and M. P. Rajya Setu Nigam v. Jain Co. (993 ATLR 574) which was relied by the Full Bench of the Tribunal, for want of evidence only nominal sum of Rs. 50,000/-has been awarded. The total amount awarded inclusive of the above mentioned two head of claim, is Rs. 11,79,166/- with interest at the rate of 12% per annum from the date of claim petition.

Shri Ravindra Shrivastava, learned Counsel appearing for the contractor in this revision in support of claim for higher amount of damage or compensation on the head of delay, submits that their was no justification for the tribunal to hold the department responsible for delay of only 14 months. It is contended that as due to the fundamental breaches found to have been committed by the department additional 37 months were required to complete the contract, the contractor was entitled to be paid damages or compensation for the entire 37 month''s delay and not 14 months delay as has been found to be attributable to the department in paragraph 10 of the award.

Shri Naman Nagrath learned Panel Lawyer appearing for the department in his reply supports the reasoning of the Tribunal contained in paragraph 10 of the award. On behalf of the department it is submitted that some part of the work site was in forest area where the trees were to be cut and uprooted by the forest department to make available the work site for construction of quarters. The work was not to be simultaneously commenced by the contractor over the entire work site. It is true that the full work site was not available to the contractor on the date of commencement of the work and it was made available only in phases. That however, cannot be the sole ground to hold the department liable for the entire 37 month''s delay caused by the time the last work site was made avaiable to the contractor. It is submitted that the Tribunal was justified in working out the extent of delay which was liable to be compensated by the department with due regard to the contractor''s own work progress. In the site available the quantity of work done by the contractor was thus a fair basis to work out the damage or compensation required to be paid to the contractor for delay on the part of the department.

We have gone through the reasoning of the Tribunal in paragraph 10 of the award on the question of extent of liability of the department for delay caused in making available the work site. According to the Tribunal the contractor had completed the work in 37 additional months but for the entire 37 months the department cannot be held liable. The extent of liability of the department is limited to the period of delay caused solely on account of the faults, omissions or errors committed by the department in respect of matter the fulfilment of which was on the department. In limiting the liability for delay of the department to 14 months, the Tribunal has also taken into consideration the fact that the contractor would not have carried out the construction work in all parts of the work site simultaneously. The contractor was also expected to execute the work in phases and not simultaneously. The work site was made available to the contractor in phases as and when the work of clearance of forest was completed in parts by the forest department. The last part of the work site was handed over to the contractor on 8.8.94 and by that time, keeping into consideration the progress of work of the contractor on the part of the site available, the Tribunal has come to a conclusion that for entire 37 months required to complete the work, the department cannot be held liable. The liability of department for delay on its part is found to be limited to the period between the due date of completion of the contract and the date on which the full work site was made available to him. Taking into consideration the progress of work of the contractor on the basis of his payment of 18th running bill the delay caused on account of the defaults on the part of the department has been worked out. On this aspect the tribunal has given due consideration to the technical knowledge availble to it. We find no error in the award of the Tribunal in that regard. The liability of the department for delay has to be ascertained with due regard to the working capacity of the contractor for the quantum of work awarded to him. We find no ground to disturb the finding reached by the tribunal that there was liability of the department for delay only to the extent of 14 months and not for 37 months which was the total period taken by the contractor to complete the work.

The next ground urged by the learned Counsel on behalf of the contractor is that the Tribunal committed a gross error of calculation in arriving at a figure Rs. 6,00,000/- only as compensation awardable towards overhead expenses. Referring to the calculation for arriving at figure of overhead expenses contained in paragraph 22 of the award it is urged that having arrived at serial No. 13 the amount of Rs. 31,45,600/- as the actual amount of overhead expenses payable to the contractor, there was no justification to reduce the overhead expenses on the ground that in the claim petition the contractor had limited his claim to Rs. 26,72,000/- for purposes of court fees. In the same respect it is submitted that there was no justification to reduce the amount by 50% and then work out overhead expenses at 45% being the extent of delay for which the department was held liable.

The learned Panel Lawyer for the State made some attempt to support the calculation and quantum of compensation arrived at by the Tribunal on the head of overhead expenses.

In order to decide whether the calculations made by the Tribunal on overhead expenses are correct or not, it would be necessary to reproduce the calculation made in paragraph 22 of the award:

Amount of contract -

Rs. 156.88 lacs

75% of prime cost -

Rs. 117.66 lacs

Period of contract -

12 months

During the scheduled period of contract anticipated amount of overhead expenses at the rate of 10% of the prime cost.

Rs. 11.766 lacs

The amount of work done during the stipulted period of contract. -

Rs. 23.51 lacs

10% of overhead expenses already paid. -

Rs. 2.351 lacs

The amount of overhead expenses not yet recovered or paid. -

Rs. 9.415 lacs

The amount of overhead expenses payable for month. -

Rs. 98.050 lacs

The amount of overhead expenses towards extended 37 months of contract between the period 27.2.84 and 31.3.87 -

Rs. 36,26,85 = Rs. 36.278 lacs

The amount of work done during the extended period

Rs. 142.37 lacs

10% of overhead expenses recovered for the extended period.

Rs. 14.237 lacs

The amount of overhead expenses not recovered for the extended period.

Rs. 22.041 lacs

The total overhead expenses payable for loss of over head expenses.

Rs. 31.456 lacs

The amount of overhead expenses and loss of profit for which a claim has been laid in the claim petition.

Rs. 26.72 lacs

50% of the amount of loss as expenses claimed by the petitioner so the claim restricted towards overhead expenses.

Rs. 13.36 lacs

The respondent department is found to be liable for delay to the extent of 45%. Therefore, the overhead expenses restricted in the petition.

Rs. 0.45 x 13.36 = Rs. 6.012 lacs = Rs. 6 lacs.

Serial No. 13 shows the figure of Rs. 31.456 lacs. In serial No. 14 (as shown above) despite the above calculation of Rs. 31.456 lacs, the awardable amount is calculated on the basis of claim on this head restricted by the contractor in his petition for purposes of Court fees to Rs. 26.72 lacs. From serial No. 15 it appers that this amount was further reduced by 50% as the claim made of 26.72 lacs by the Petitioner was a consolidated claim for overhead expenses and loss of profit. The 50% amount as claimed (13.36 lacs) is further reduced to 45% which was held to be the extent of liability for delay on the part of the department. Thus in round figure a sum of Rs. 6,00,000/- has been awarded. There is great force in the contention advanced on behalf of the contractor that the calculation of quantum of compensation on this head should have been made on the basis of figure of compensation towards overhead worked out up to serial No. 13 i. e. 31.456 lacs. Even if the calculation would have been made on that basis, the total awardable amount would still have been less than the amount of 26.72 lacs claimed in the petition and on which the court fees was paid. We find also great merit in the submission made that the figure of 31.456 lacs arrived at one the of loss of profit should have been reduced by 45% being the extent of delay attributable to the department. Calculating thus the figure works out to Rs. 14,16,640/-. This should have been the correct amount of the consolidted claim of overhead expenses and loss of profit.

In the impugned award relying on the two decisions of the this Court in the case of State of M.P. v. M/s Recando Ltd. (1989 MPLJ 822) : (1993 ATLR 557) and M.P. State Bridge Corporation v. M/s Jain & Co. (1993 ATLR 574) a nominal sum of Rs. 50,000/- has been awarded as loss of profit on the ground that no evidence was led by the contractor to support the claim on this head of loss of profit.

Learned Counsel appearing for the contractor strongly relies on the decision of the Supreme Court in Dwaraka Das Vs. State of Madhya Pradesh and Another, and contends that the decision of M.P. High Court in that case was expressely over-ruled and the decision of division bench of this Court in Recando Ltd. (supra) has been impliedly over-ruled. The Supreme Court has up-held grant of damages for loss of profit on a basis of a fixed percentage of 10%.

So far as this claim by the contractor is concerned no separate amount for loss of profit was claimed. As is clear from Schedule-A of the Claim Petition consolidated amount restricted to Rs. 27.72 lacs was claimed on a foumula jointly for infructuous ''overhead expenses'' and ''loss of profit''. The question before us is whether in the absence of any supporting evidence for such a claim can it be awarded only on a basis of a formula or fixed percentage. In the case of M/s Recando Ltd. (supra) by examining the legal question this Court expressed a view that the contractor is expected to lead evidence of estimated loss of profit and if he fails to do so, even if the department is found to be in breach, the contractor would be entitled to only nominal damages. The claim for loss of profit and overhead expenses may arise in different contingencies. There may be a case of fundamental breach of contract on the part of department at the very initial stage of the contract. The breach may be committed by the department in the midst of a contract and in other cases it may be committed at the fag end of the contract. The other contingency may be where there is mere prolongation of the period of contract and the contractor is allowed to complete the work although in the extended period. In such cases the quantum of overhead expenses and loss of profit would vary. All kinds of such claims cannot be awarded on a fixed percentage. On such claim the contractor is not expected to prove the actual loss towards profit. It can, however, prove actual loss of infructuous overheads by producing its accounts and leading other evidence. So far as loss of profit is concerned, the contractor can certainly place material to show on what basis he estimated a particular percentage of profit and was disabled from gaining it. Evidence only with regard to the anticipated loss of profits is expected from the contractor which may be in the shape of its account books calculations made in the office before submitting its tender and income tax assessments made in similar works contract of the Petitioner or others.

Relying on the decision of the Supreme Court in the case of Dwarkadas (supra), it is argued that the decision of this Court not only in the case of Dwarkadas (supra) but in case of M/s Recando Ltd. (supra) has been impliedly over-ruled and there can be no insistence on leading of evidence by the contractor on claim of loss of profit.

We have carefully gone through the decision of Supreme Court in the case of

Dwarka Das (supra) to ascertain whether the decision completely dispenses with any evidence on the head of loss of profit.

As we have already mentioned above claim for loss of profit may arise in different eventualities such as where there is a partial or total prevention of contract due to breach on the part of the department and the third contingency is where the contractor is allowed to complete the work but during an extended period for delay solely occasioned due to the breach on the part of the department. The quantum of loss of profit in all the three eventualities cannot be the same. It would differ from case to case depending upon the nature of the contract, progress of work of the contractor and other factors relevant in works contract. What we find from the decision of Dwarka Das (supra) is that where the claim is made on loss of profit there can naturally be no insistence on proof of ''actual loss suffered'' by the contract. The nature of claim is such that no contractor can prove actual loss of profit suffered by him. The contractor, however, can and should place material and evidence to base his claim for anticipated loss towards profit. We do not find that the case of Dwarka Das (supra) of the Supreme Court is an Authority to accept the contention on behalf of the contractor that the contractor is totally absolved from his burden of leading any evidence to substantiate his claim towards loss of profit. We had occasion to deal with a similar argument concerning a claim of similar nature in the case of another works Contract in C. R. 608/89 State of M.P. and Ors. v. Smt. Gyan. Kaur (supra). We have in detail discussed the nature of claim towards overhead expenses and loss of profit. So far as overhead expenses are concerned they have been described to mean ''off site'' or ''head office expenses'' such as for establishing an office, supervisory staff, power bills, stationery, journeys performed, telephone bills and several other similar expenses required to fulfil the contract. So far as the overhead expenses are concerned, the contractor can certainly lead evidence oral and documentary to prove the actual expenditure towards overheads.

In the Instant case the claim petition filed by the Contractor shows that as per Schedule-A to its petition, it has put up a consolidated claim at 10% of the prime cost calculated in the sum of Rs. 118.674 lacs but the claim is restricted on these two heads of claim of overhead and loss of profit to Rs. 26.72 lacs on which amount the Court fees was paid.

In our considered opinion the case of Dwarka Das of Supreme Court (supra) does not lay down that the contractor is completely absolved from his burden to lead evidence in support of his claims and he has to be awarded damages or compensations on such heads on a fixed formula or at 10% of the contract price. The Supreme Court in the case of Dwarkadas (supra) up-held the grant of claim at 10% of prime cost on the head of loss of profit and in doing so it has stated that the contractor could not be expected to prove actual loss suffered by him. The decision of Supreme Court, however, cannot be read laying down that the contractor is not expected in all eventualities to lead any evidence as to on what basis he claims a particular amount towards loss of profit and overhead expenses.

In the instant case the Contractor had laid in Schedule-A consolidated claim at the rate of 10% towards overheads and loss of profit but has lead no evidence in support of such claim.

We have held above that the claim calculated on overhead expenses as shown in pargraph 22 of the award is clearly erroenous as there was no justification to divide the claim by 50% and further reduce it by 45% in the absence of any evidence. The Tribunal also committed mistakes in awarding only Rs. 50,000/- towards loss of profit relying on the decision of this Court in the case of M/s Recando Ltd. (supra). In doing so the Tribunal lost sight of the fact that the contractor has made a consolidated claim towards overhead and loss of profit and the claim could not have been spilited in the manner done by the Tribunal.

In the interest of justice, in our opinion the case deserves to be remanded to the Tribunal to allow the parties to lead evidence and produce material in relation to the consolidated claim. The tribunal after giving due opportunities to the parties shall adjudicate afresh the claim of the contractor towards overhead expenses and loss of profit. The remaining part of the award passed by the Tribunal in relation to other claims is hereby confirmed and shall remain undisturbed. Let the Tribunal after service of due notice to the parties and after permitting them to lead evidence take a fresh decision only on the above mentioned head of claim of the contractor towards overhead expenses and and loss of profit. The record of the Tribunal shall forthwith be returned. In the circumstances, the parties shall bear their own costs.

