

(1997) 01 BOM CK 0038

In the Bombay High Court

Case No : Appeal No. 1249 of 1996 in Arb. Petition No. 86 of 1995

M/s. Shyama Charan Agarwala and Sons

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-01-1997

Acts Referred:

Citation : (1997) 01 BOM CK 0038

Hon'ble Judges : M.B. Shah, J;F.I Rebello, J

Bench : Division Bench

Advocate : Sh. Virendra Tulzapurkar and Sh. N. B. Jagad, for the Appellant; Sh. M.B. Shah, for the Respondent

Judgement

M.B. Shah, C.J.—This appeal is filed against part of the order dated 14th June, 1996 passed by the learned Single Judge in Arbitration Petition No. 86 of 1995. The appeal is against the order passed with regard to claim No. 8 of the statement of claim filed by the contractor before the learned Arbitrator. It pertains to compensation for extra expenses and losses suffered or incurred by the contractor due to the prolongation of the contract period on account of various breaches of the agreement alleged to have been committed by the Department. The contractor claimed Rs. 28,76,035.00 towards compensation under the said head. The Arbitrator awarded a sum of Rs. 20,95,255.00.

2. That part of the award is set aside by the learned Single Judge on the ground that the Arbitrator misconducted himself in awarding the said amount. The learned Single Judge arrived at the said conclusion after referring to Clause 11 of the Agreement.

3. The learned Counsel appearing for the appellants vehemently submitted that the Arbitrator, after considering each and every application by which the time was extended for execution of the contract, has arrived at the conclusion that in some cases the extensions were beyond Conditions (A) and (B) of Clause 11 of the Contract. Therefore, compensation was awarded only with regard to those

extensions. He, therefore, submitted that the learned Judge exceeded his jurisdiction in setting aside the award by re-appreciating the evidence. The learned Counsel submitted that once the Arbitrator has appreciated the agreement and the clause thereof, even if it is erroneous interpretation of the agreement, the Court cannot set aside the award.

4. In our view, this submission is without any substance. Relevant part of Clause 11 of the Agreement, inter alia, provides as under :

"11. Time, Delay and Extension :

(A)xxx xxx xxx

.... It shall indicate the forecast of the dates for commencement and completion of the various trade processes or sections of the work, and shall be amended as may be required by agreement between GE and the contractor within the limitation of time imposed in the contract documents or Works Order. If the work be delayed :-

(i) by force majeure, or

(ii) xxx xxx xxx

(iii) xxx xxx xxx

(iv) xxx xxx xxx

(v) xxx xxx xxx

(vi) xxx xxx xxx

(vii) by reason of any other Clause, which in the absolute discretion of the Accepting Officer is beyond the Contractor's control;

then, in any such case the Officer hereinafter mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of work for which separate periods of completion are mentioned in the contract documents or works order, as applicable.

Extension of time, as granted above, shall be communicated to the contractor by GE in writing and shall be final and binding. Provided that in the case of contracts (other than Term Contractors) accepted by the GE in the event of Contractor not agreeing to the extension granted by the GE, the matter shall be referred to the CWE whose decision shall be final and binding.

(B) If the Works be delayed :

(a) by reason of non-availability of Government stores shown in Schedule "B"; or

(b) by reason of non-availability or break down of Govt. Tools and Plant listed in Schedule "C" then in any such event, notwithstanding the provisions hereinbefore contained, the Accepting Officer may in his discretion grant such

extension of time as may appear reasonable to him and the same shall be communicated to the Contractor by the GE in writing. The decision so communicated shall be final and binding and the contractor shall be bound to complete the works within such extended time.

(C) No claim in respect of the compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted."

From the aforesaid Clause (A) it may be stated that :

(i) If work be delayed by reason of any other cause, which is beyond the contractor's control, then on the application made by the contractor it is open to the Accepting Officer to extend the time contemplated for completion of the contract work.

(ii) In case the contractor is not agreeing to the extension granted by the Accepting Officer, the matter shall be referred to the C.W.E. (Commander Works Engineer) whose decision shall be final and binding. Admittedly, in the present case, contractor has filed applications for extension of time and applications were granted. At no point of time, the contractor has raised any dispute with regard to the grant of extension by the officer concerned.

(iii) In the statement of claim filed by the appellants, it has been mentioned as under :

"10.1 It would be seen from para 1.2(1) and para 3 hereinbefore that the respondent had granted as many as 8 extension dragging the work, which was planned for completion within 18 months to a period of 47 months. This itself is a serious breach of the Contract, as all the extensions were granted by the respondent due to reasons which were beyond the control of your humble claimant. The reasons for grant of extensions were all due to bad planning and delay in decision, non-availability of Government stores to be issued under Schedule "B". These are undisputed facts for grant of extensions of time."

In view of the aforesaid admission in the statement of claim, it is apparent that extensions were granted by the respondents at the instance of the appellants and the appellants have pointed out that the time was extended by the respondents due to reasons which were beyond the control of the claimants. It has been also specifically mentioned that the reason for grant of extensions was all due to bad planning and delay in decision and non-availability of Government stores to be issued under Schedule "B".

5. If this is the position, it cannot be said that extensions which were granted by the respondents for execution of the work are not covered by Clauses 11(A) or (B) of the Agreement. Extensions were granted at the request of the appellants. As per Clause 11(A), extensions of time granted are final and binding on the contractor. Further, he has never raised any dispute for such extensions. Otherwise matter would have been referred to the C.W.E. Once the said

extensions are covered under Clauses 11(A) or (B) of the Agreement, under Clause 11(C) neither party to the agreement is entitled to claim compensation or otherwise howsoever arising as a result of extensions granted under Conditions (A) and (B) of Clause 11. Therefore, in our view, the learned Single Judge rightly set aside the award passed by the learned Arbitrator by misconstruing the aforesaid clauses of the agreement.

6. While dealing with a similar clause in the case of Union of India Vs. M/s. Ajit Mehta and Associates, Pune and Others, , the Court held that when there was a specific prohibition against entertainment of such claim in the contract, it was certainly not open for the arbitrators to grant the same and if the arbitrators have granted the same, they are guilty of legal misconduct on that count. In such a situation, the arbitrator has not only misread or misconstrued or misunderstood the contract but has acted in excess of what was agreed. It was an error going to the root of his jurisdiction because the arbitrator asked himself the wrong question, disregarded the contract and awarded an amount which was not contemplated under the agreement.

7. Apart from this aspect, it has been pointed out that once extensions for execution of the contract work were granted, the loss which is suffered by the contractor because of the escalation price of material and labour has been paid to the contractor under the escalation clause. In our view, we are not required to consider this contention in this appeal. In the present case, as discussed above, the contractor has specifically applied for grant of extension of time and time was granted.

8. In this view of the matter, there is no substance in the appeal and it is, therefore, dismissed.

9. Issuance of certified copy of this order is expedited.

10. Appeal dismissed.