
(2002) 05 MP CK 0040
In the Madhya Pradesh High Court
Case No : Civil Revision No. 567/96

Narmada Construction Company	Vs	APPELLANT
Ujjain Nagar Palika Nigam and Others		RESPONDENT

Date of Decision : 03-05-2002

Acts Referred:

Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 — Section 19

Citation : (2003) 1 MPHT 191

Hon'ble Judges : Deepak Verma, J;A.K. Gohil, J

Bench : Division Bench

Advocate : Ajay Assudani, for the Appellant; K. Vijayvargiya, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Gohil, J.—This order shall also govern disposal of Civil Revision Nos. 568, 569, 570, 571, 572 and 573 of 1996 (M/s. Narmada Construction Company, Khalghath v. Ujjain Nagar Palika Nigam, Ujjain and 2 others) as all these Civil Revisions have been preferred against the common Award dated 31-1-1996 passed by M.P. Arbitration Tribunal, Bhopal in Reference Case Nos. 215, 216, 217, 218, 219, 220 and 221 of 1991.

2. The long and short facts involved in these reference petitions are that the petitioner Company filed aforesaid seven reference petitions before the Arbitration Tribunal, Bhopal for claiming an award for Rs. 3,29,000.00; Rs. 6,70,049.00; Rs. 2,63,103.00; Rs. 3,90,000.00; Rs. 92,369.00; Rs. 1,71,819.00 and Rs. 2,16,096.00 respectively against Ujjain Nagar Palika Nigam, Ujjain for infructuous overheads; loss of profit; refund of earnest money and ante-lite interest/The terms and conditions of the contracts, the circumstances and the facts of all these seven cases are identical, except for numbering of the exhibited documents. It is not in dispute before us that the entire evidence in all these seven cases is the same and, therefore, the Tribunal had discussed the evidence only in Reference Case No. 215 of 1991.

3. Petitioners claim in all these reference petitions before the Tribunal was that in all these seven reference petitions identical contracts for asphaltting work by hot-mix method on different roads in the town of Ujjain were awarded to the petitioners. The notice inviting tenders were issued. Tenders were received on 28-10-1989 and its acceptance in Reference Case No. 215 of 1991 was communicated on 13-7-1990. It is not in dispute that there was delay in the acceptance of tenders by the Government. The work order was issued on 9-10-1990. The case of the petitioners was that after issuing work order on 9-10-1990, the site for asphaltting work could not be made available during the entire stipulated period of completion because the base was not fit and ready for the asphaltting work as the roads were damaged due to heavy rains and were required to be strengthened by water bound macadam (W.B.M.) base and thus could not be made available for asphaltting work.

4. In the written statement the defence of the respondents was that the petitioner was not entitled for any damages, on account of loss of profit as well as infructuous overheads and their further submission was that the respondents/ Corporation has not committed any breach of contract as in the meeting dated 25-4-1991 the petitioner himself had agreed for extension of time and on the basis of which a Resolution No. 306 was passed on 7-5-1991 by the Administrator and thereafter on 16-5-1991 intimation was given to the petitioner and even after agreeing for completing the work after 25-4-1991 despite the repeated reminders and letters by the respondents/Corporation, the petitioner did not turn up for starting work. This position was also admitted by the petitioner that the contract work for asphaltting could not commence in the rainy season as the same was not feasible and possible. Therefore, the petitioner did not commence the work and has not completed the same but claimed 10% amount of the contractual amounts towards the loss of overheads and 10% towards loss of profit as the respondents have committed breach of contract by not delivering the agreed roads for asphaltting work to the petitioner till after the expiry of stipulated period and even thereafter.

5. The claim petitions were heard by three Member Bench of the Tribunal. On 31-1-1996 learned Member Surjeet Singh passed an award in favour of the petitioner/claimant and allowed 5% infructuous overheads on the prime cost of the contract and also 5% amounts towards loss of profits on the prime cost and also ordered for refund of earnest money including 12% interest from the date of filing of petitions till realisation.

6. The award was placed before the learned Chairman of the Tribunal. The learned Chairman did not agree on the question of awarding quantum of compensation which was proposed by the learned Member Surjeet Singh in his proposed draft award. The learned Chairman of the Tribunal after considering the entire evidence has held that the petitioners have failed to prove the quantum of loss of profits caused to them by deprivation of the present contracts and directed to award them nominal damages equivalent to the amounts of

overheads, which was calculated by him as 1% on the prime cost of the award excluding the cost of bitumen which was to be supplied by the respondents under the contract in each case.

7. This award was further placed before the third learned Judicial Member B.L. Singhal, who consented his agreement with Hon"ble the Chairman both in reasoning and conclusion.

8. Against this common award, the petitioners have filed these revisions before this Court u/s 19 of the Madhya Pradesh Madhyas-tham Adhikaran Adhiniyam, 1983.

9. We have heard Shri Ajay Assudani, learned Counsel for petitioners and Shri K. Vijayvargiya, learned Counsel for respondents/Corporation in all these revisions.

10. Shri Ajay Assudani, learned Counsel for petitioner submitted very vehemently that the Tribunal has wrongly awarded nominal damages whereas petitioner should have been awarded damages at the higher rate as the respondents/Corporation intimated its acceptance after a long delay and had not handed over the site after issuance of work order on 9-10-1990. He has also placed reliance on Supreme Court decisions in the case of A.T. Brij Paul Singh and Others Vs. State of Gujarat, , followed in the case of Dwarka Das v. State of M.P. and Anr., reported in 1992 (2) J.L.J. 83 and further submitted that the Tribunal has not granted proper compensation towards loss of infructuous overheads and also towards loss of profit. The minimum amount under both the heads should be 10% of the value of the contract.

11. Though the respondents/Corporation has not filed any revision against the aforesaid order of granting nominal damages but the submission of Shri Vijayvargiya, learned Counsel for respondents/Corporation is that the petitioner has failed to make out any case for award of any higher compensation than what has already been awarded by the Tribunal and prayed for dismissal of the revisions.

12. We have perused the award passed by the Tribunal and also perused the documentary as well as oral evidence on record.

13. The Tribunal after critically examining the evidence on record, recorded the following finding in Para 20 of the award that-

"No evidence was adduced by the petitioners to show that they had employed any supervisory staff or security personnel or erected any huts or any office at the site. In other words, the entire evidence shows that the petitioners incurred, if at all, only negligible expenses towards on-site overheads."

It has been further held in Para 21 of the award that-

"There is no evidence in the present case showing volume of Head Office overheads, which the petitioners might have incurred, which may properly be apportionable to the 7 contracts under consideration. It is not known how much

big office or offices the petitioners maintain and the volume of expenditure they have to incur in maintaining them. Considering, however, the fact that the petitioners are A-4 class contractors, we can hazard a guess that they must have incurred 1% of the admissible overhead expenses towards Head Office expenses. Accordingly, we award to the petitioners 1% of the prime cost of the works, excluding cost of bitumen which was to be supplied by the respondents under the contract, in each case towards loss on account of infructuous overhead expenses."

It was further held by the Tribunal on the question of assessing compensation for loss of profits, after applying the ratio in the case of *State of M.P. v. Recondo Ltd.* (1993 A.T.L.R. 557) that-

"Since the contractor had failed to give any evidence on the question of quantum of loss of profits, he was entitled to be awarded only nominal damages."

The Tribunal further held that-

"A five Member Full Bench of this Tribunal in *Idandas Wadhvani v. State of M.P.* (1993 A.T.L.R. 322) relying on the decision of *Recondo Ltd.*, laid down that where a contractor failed to prove quantum of loss of profits by adducing evidence, he was entitled to only nominal damages."

Thus, the Tribunal concluded that where a contractor fails to give evidence on the question of quantum of loss of profits, he is entitled to be awarded only nominal damages.

14. The Tribunal also examined Income Tax Returns which were filed by the petitioners as Exs. P-5 and P-27 and has also considered this aspect of the matter that in petitioners return of 1990-91 a very low income of 1.43% has been shown as percentage of profit. It was further noted by the Tribunal that the most conspicuous feature of the present contracts was that in all of them the percentage quoted by the petitioners was 6% below C.S.R. of P. W.D. Building and Roads for Ujjain Circle which was in force from 15-8-1982 as corrected upto 15-7-1985 and there was no escalation clause in the agreement. It was further observed by the Tribunal that even after this the tenders were submitted by the petitioners 6% below the C.S.R. which was taken into consideration and was also 4 years obsolete at the time of submitting the tenders. It has been further held in the award by the Tribunal that when the stipulated period of the 7 contracts was just over, the petitioners through their letters, Exs. P-17, P-20 and P-21 to the respondents began to say that they were even then willing to execute the present contracts, if the Corporation was willing to pay them the then prevailing rates, which according to them were about 30% above the C.S.R. Thus, the finding of the Tribunal was that these works were not profitable to the petitioners as there was no escalation clause and if the contractor would have executed, he would have suffered a loss of 36%. From this finding of the Tribunal it is clear that the petitioners themselves were not interested in executing the work looking to the anticipated losses after mathematical calculation out of the execution of

the works contract.

15. By a letter dated 29-1-1991, Ex. P-15 a direction was given to the contractor to start the work on the road starting from Akhand Ashram to Gudari Chowk via Harsiddhi Mandir and Choubis Khambha Marg. By another letter dated 15-1-1991 a direction was given to instal the Hot Mix Plant at site so that lay out of the work may be given. This letter of 15-1-1991 was acknowledged by the contractor on 5-2-1991 vide Ex. P-16 and on 25-4-1991 and a meeting was organised at Sinhastha Mela Office and an understanding was arrived that the petitioners in place of the present 7 contracts would be given work of asphaltting of roads in Madhav Nagar locality on the condition that the petitioners would be paid escalation and the work given would be for at least 1.25 crores. There was another resolution dated 7-5-1991 about raising of the percentage and including of condition of escalation. On 19-6-1991 by Ex. P-22 the contractor wrote a letter without starting the work as per earlier directions asking for some clarification. By letter dated 16-5-1991 Annexure R-5 it was intimated to the contractor by the Corporation that the Corporation has agreed to pay the escalation charges and it was directed to instal Hot Mix Plant and Machinery for starting work. Again a reminder was issued on 30-5-1991 vide Annexure R-6 to start the work. Again another reminder was issued on 6-6-1991 to the contractor to start the work. Again a letter was issued on 22-6-1991 by Annexure R-8 to start the work and to intimate and again by letter dated 4-7-1991 (Annexure R-9) a direction was given to the contractor to start and complete the work on priority basis as the same work was in public interest. But despite these letters the contractor failed to start the work and ultimately Corporation was compelled to call a meeting on 8-8-1991 in the office of the Commissioner of the respondents/Corporation to discuss about the commencement of the work and in that meeting the contractor again had agreed to start the work of asphaltting. Again vide letter dated 21-8-1991 Annexure R-12 it was communicated to the contractor that the Corporation is willing to provide escalation, therefore, he should start the work otherwise the contractor would be liable for the damages which would be suffered by the Corporation. But even after the aforesaid reminders the contractor has failed to start the work despite the availability of the site and accepting the condition for payment of escalation charges. The learned Tribunal has failed to consider all the aforesaid facts and features, documents and the circumstances on record while granting nominal damages to the petitioners. In fact from the aforesaid record it appears that it is a case in which despite various reminders the petitioners did not start the work and have failed to perform and execute the contract even after consent. Thus, when the contractor himself has failed to execute the work, he was not entitled for grant of any amount towards even nominal loss of profit. Obviously the reason was that earlier the contracts were 6% below C.S.R. and later on he attempted to pursue the department to pay escalation charges and when the department had agreed to pay the escalation charges, the petitioner backed out and did not turn up, without any valid reason.

16. It is also not in dispute that in para 18 of the Award the Tribunal itself has recorded that receipts, Exs. P-31 to P-35 were filed to show that the petitioners had incurred expenses in shifting of Hot Mix Plant from Khalghat to Ujjain. The Tribunal recorded that the falsity of this claim is exposed from the petitioners' own letters filed in the case but subsequently in letter dated 8-5-1991 (Ex. P-19) it was clearly stated that because the respondents had not executed a written contract for asphaltting of the roads in Madhav Nagar locality, the petitioners had not shifted the Hot Mix Plant till then. The Tribunal has also recorded that the petitioners brought their Hot Mix Plant as late as on 16-6-1991 and that too for executing some other works of P.W.D. at Ujjain whereas the period of 7 contracts had expired in February, 1991 and if the Hot Mix Plant was shifted, then it was shifted in connection with different contracts of the petitioners as he was involved in executing other contracts at Ujjain at the relevant time and it was not shifted to execute the work of these 7 contracts.

17. After considering documentary evidence available on record, we are of the considered opinion that the Tribunal has even wrongly awarded nominal damages towards loss of overheads as well as towards loss of profit at the rate of 1% because as per the Tribunal's own finding, the petitioners could not prove his case either for establishment of any office at site for claiming infructuous overheads or loss of profit simply on account of non-availability of site. Consequently, no case was made out even to award nominal damages when the contractor was busy in other work, and later on he failed to execute the contract even after availability of site and grant of escalation, in no case the petitioner was entitled to claim any damages for loss of profit. Thus, according to us, looking to the evidence on record, the petitioners were not entitled for claiming any amount towards loss of profit. The petitioners have not submitted any calculations or documents before the Tribunal to prove anticipated profits that how they would have earned profit out of these 7 contracts after incurring cost of labour, material and supervision. In such circumstances, we hold that the Tribunal has wrongly awarded even nominal damages towards infructuous overheads and towards loss of profits. Though by giving reasonings the Tribunal had itself rejected the case of the petitioners for awarding higher percentage of damages in both the aforesaid heads. Since the respondents/Corporation has not challenged the award, the award cannot be set-aside because this is a revision for enhancement of compensation. Therefore, under a judicial discipline the amount awarded by the Tribunal, if not challenged in any manner, the same cannot be reduced. Under these facts and circumstances of the case and looking to the evidentiary material available on record, we do not find that the petitioners could prove any case for awarding more damages either towards loss of infructuous overheads or under the head of loss of profit.

18. It is not the case in which the contract was illegally rescinded by the Corporation and the petitioners were put to loss or had suffered any losses on account of the said action of the respondents/Corporation. As per the decision of the Supreme Court in the case of A. T. Brij Paul Singh (supra), damages can be

claimed by a contractor where the Government, is proved to have committed breach by improperly rescinding the contract.

19. In this case the facts are some what different. The Government had not rescinded the contract but it is a case where the contractor has himself backed out from the work. The contractor was busy in performing work of other contracts and he was not sitting idle. As he has not proved the damages for loss of profit which he would have expected to earn by undertaking the works contract. In fact it was the burden on him to prove the expected profit by showing that after putting men and material and after incurring supervisory charges he would have earned profit but since the petitioners have failed to prove and thus he failed to make out a case for claiming any amounts towards expected profit, the Tribunal has awarded nominal damages considering the entire evidence on record in both the heads at the rate of 1%. Thus, we do not find any case for enhancement of the amount of compensation to the petitioners as the contracts were not rescinded by the Corporation, in fact they were not executed by petitioners.

20. Thus, we find no merit and substance in the aforesaid revisions. All the revisions preferred by the petitioners are hereby dismissed with no order as to costs.

21. Retain this order in the record of Civil Revision No. 567 of 1996 and place its copy in each of the connected revisions, as particularised above, for ready reference.