
(2002) 05 DEL CK 0064

In the Delhi High Court

Case No : S. 1707-A/95 and is 4579/96

Osnar Paints and Contracts Pvt. Ltd.

APPELLANT

Vs

National Buildings Construction Corpn. and Another

RESPONDENT

Date of Decision : 17-05-2002

Acts Referred:

Arbitration Act, 1940 — Section 16

Citation : (2002) 6 AD 53 : (2002) 3 ARBLR 653 : (2002) 98 DLT 578 : (2002) 64 DRJ 820

Hon'ble Judges : B.N. Chaturvedi, J

Bench : Single Bench

Advocate : Seuta Vaidialingam, for the Appellant; Arvind Minocha, for the Respondent

Judgement

B.N. Chaturvedi, J.—Disputes having arisen, mechanism for resolution of such disputes provided under the contracts entered into between the petitioner (claimant) and respondent No. 1(objector), was set in motion leading to appointment of respondent No. 2 as sole arbitrator. The arbitrator set out to discharge his adjudicatory function by entering upon reference which culminated into making of the impugned award for an aggregate sum of Libyan Dinar (LD), 19575.00.

2. The claimant accepts award inasmuch as adjudication on its claims is concerned. It, however, seeks payment of the awarded sum in Indian currency instead of in Libyan Dinar. Consequently, while seeking the award to be made rule of the court, a prayer is made that the awarded amount may be translated from Libyan Dinar into Indian currency.

3. To the objector on the other hand, the award is unacceptable. Assailing the award on a number of grounds, as set out in its objections (IA. 4579/96), it pleads for setting aside the same.

4. For better comprehension of objector's grievance against the award, certain

material facts may be noticed first. Centre-stage of disputes lay far away from Indian soil at Baniwalid in Libya, where the work-site was situated. The claimant and the objector entered into there contracts dated 16.7.1980, 8.8.1982 and 8.8.1982 for painting 665 houses, schools and a PSSI building, respectively at Baniwalid in Liyba. The objector was the main contractor as far as Libyan Government was concerned, while the claimant was appointed by it as its sub contractor pursuant to floating of tenders.

5. Disputes arose between the parties under various heads and the claimant raised claims against the objector as detailed hereunder:-

LD Rupees 1. Claim No. I- Putty work 35233.760 16,86,034.00

2. Claim No. II- Extra work 2784.942 1,33,267.27

3. Claim No. III- Billing (Balance and discrepancy) 20642.712 9,87,811.56

4. Claim No. IV- Escalation 24563.024 11,75,409.40

5. Claim No. V- Office Maintn. 27512.040 18,16,528.10

6. Claim No. VI- Interest 41656.228 19,91,388.50

TOTAL 152392.706 72,90,438.83

6. Besides, following claims, which had arisen in India, were raised separately:-

Rupees

1. Claim No. VIII- Legal costs & expenses 50,000.00

2. Claim No. VIII- Damages 10,00,000.00

3. Claim No. IX- Bank Charges. 50,000.00

TOTAL 11,00,000.00

7. The claimant thus, claimed a sum of LD. 152392.706 = Rs. 72,90,438.83 plus Rs. 10 lakhs together with future interest @ 18% p.a. on all the claims until the date of payment and compensatory costs, from the objector. In spite of the claimant seeking award in Indian currency, the arbitrator made the award in Libyan Dinar only.

8. In the award, the name of the claimant was incorrectly mentioned as "M/s. Osnar Paints Pvt. Ltd." instead of "M/s. Osnar Paints & Contracts Pvt. Ltd". On the said error being pointed out by the claimant, vide its letter dated 22.5.1995, the arbitrator made necessary amendment in the award and communicated the same to the claimant vide his letter dated 19.6.1995. In its aforesaid letter dated 22.5.1995, apart from seeking correction of its name, the claimant had also made a request to the arbitrator to translate the awarded amount into Indian currency and make the same as "directive" part of the award. To this request ,however, there was no response from the arbitrator. This is how the

claimant while seeking award being made rule of the court, also prayed for translating the awarded amount from Libyan Dinar into Indian currency.

9. Not happy with the award, the objector pleads for setting aside the same, inter alia, on the grounds that the entire amount in terms of its bills having been paid to the claimant, no extra amount was payable to it and the arbitrator erred in awarding the same. The arbitrator is alleged to have misread the documents and the contracts between the parties and exceeded his authority in making the award. According to the objector, delay in completion of work being attributable to the negligence and/or default on the part of the claimant, the arbitrator was not justified in awarding escalation. It is asserted that by making the award wholly contrary to the terms of the contracts between the parties, the arbitrator exceeded his jurisdiction and misconducted the proceedings thereby rendering the award liable to be set aside.

10. I have heard the learned counsel on either side.

11. Sustainability of the impugned award, as a whole, though questioned on various grounds, challenge thereto, in the course of hearing, was confined by the learned counsel for the objector in respect of claim No. 2 only which relates to the amount claimed on account of escalation. Against a claim of LD> 24563.024 made by the claimant, the arbitrator awarded an amount of LD. 18120.00 on this count. The arbitrator, contended the learned counsel for the objector, exceeded his jurisdiction by awarding the said amount contrary to the terms of the agreement between the parties. In this connection, he made reference to para 4 of the Financial Terms & Conditions, which reads thus:

"4. Rates to be firm:

The rates accepted by the PRW shall be firm and shall include all his expenses for execution and handing over the work to the corporation as well as for maintenance during the maintenance period according to the items of the contract. The PRW shall have no. right to claim any increase in the agreed contract rates because of increase in the cost of living or increase in price of oil or any other increase whatsoever."

12. There is no controversy that the Financial Terms & Conditions spell out the terms of contracts between the parties. It is, however, pleaded on behalf of the claimant that owing to acts of commission and omission on the part of the objector, execution of the work was delayed resulting into increase in the prices of material. It is pointed out that the claimant requested the objector to off-set the extra cost incurred by it due to escalation in the prices of material and the objector responded by assuring it to consider its request sympathetically. The objector is said to have never declined the claimant's request for escalation and the same had rather remained under its consideration, aforesaid para 4 of the Financial Terms & Conditions notwithstanding. This, according to the claimant, amounted to modification of para 4, which prohibited any escalation. A reference was made to a series of correspondence addressed to the objector for being

compensated for escalation and the minutes of a meeting held on 5th of January, 1986 to consider its request for the same. Following "observations and guidelines" were recorded in the minutes of the said meeting in regard to the request for escalation in price:-

Escalation in price : Observations & Guidelines .

The completion period being 10 months from the date of the letter of -- including the Whilst not going into 45 days of the merits of the mobilisation, the works back-to- back contract continued to nearly and the benefits the 3-1/2 years for want of Corporation obtained, houses to be painted. it was suggested and Requested that since found advisable to find works had to be carried out means by which out beyond the contractor could be contracted period for compensated. want of houses and in view of sharp rise in price of materials. Cost of living, transport and wages, we be given fair, reasonable and suitable reliefs, as more clearly stated is our letters on the subject.

Equally, it is For the purpose it was maintained by the NBCC indicated that some that the contract is a scheme be worked out on back-to-back contract the basis of houses and as such we feel completed till, say the eligible for receiving contract period 31st such rates escalation March, 1981 and granted by the clients thereafter some benefit to NBCC of 9.8- on 905 passed on to Osnar to house 24% on 75 houses compensate them. Unit and 60% on 20 house a office to report on the progress of houses and other relevant details of houses completed."

13. Learned counsel, appearing for the objector, however, maintains that the above extracted "observations and guidelines", recorded in pursuance of letters of request from the claimant for escalation in price, did not tantamount to modification of para 4 of the Financial Terms & Conditions and, Therefore, the arbitrator in the face of aforesaid clause could not have awarded any amount on account of escalation.

14. The claimant does not contest the proposition that but for the alleged modification in para 4, it was not entitled to claim escalation. Was there any modification in para 4 prohibiting escalation, is thus the question of prime importance. Admittedly, execution of work by the claimant was preceded by formal contracts entered into between the parties. thus, this is not a case where the terms of the agreement have to be inferred from correspondence and tender notice etc. No formal contract modifying para 4 of the Financial Terms & Conditions is said to have been executed between the parties at any subsequent point of time. Letters of request for escalated cost simply exhibit instance of unilateral act on the part of the claimant. Pursuant to the claimant persisting in its request for being compensated on escalation count, the meeting held on 5th of January, 1986 and "observations and guidelines" recorded in the course of that meeting, as extracted hereinabove, do not appear to reflect any agreement on the part of the objector acceding to alleged modification in para 4. The result

of deliberations in the course of the meeting were recorded in the form of "observations and guidelines" only to find ways to compensate the claimant to some extent. This was simply in the nature of a concession which the objector thought of extending to the claimant. By no means, this could be termed as giving rise to a concluded contract altering or modifying para 4 of the Financial Terms & Conditions. In the circumstances, while considering the claim for escalated cost, the arbitrator was obliged to act in conformity with the agreed terms of the contract.

15. The error in the construction of contract in an error within the jurisdiction of the arbitrator, but if he over-steps the contract, he commits jurisdictional error. In " Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , referred to by the learned counsel for the objector, where one set of claims related to "Escalation on Napa Slabs"; "Payment of Extra Lead for water"; and, "Extra Expenditure incurred due to flattening of canal slopes and consequent reduction in top width of banks used as roadway", there was specific prohibition against price adjustment or award of escalated cost in respect of any matter falling outside the clause in the contract providing for escalation on certain specified items and where aforesaid set of claims were not covered there under, the arbitrator by awarding escalation in respect thereto was held to have acted without jurisdiction. It was held:

"27. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill & Boyd's Commercial Arbitration, Second Edition ,p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, Fourth Edition, Para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

28. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside....."

16. In New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation, ; V.G. George Vs. Indian Rare Earths Ltd. and Another, and Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, , relied upon by the learned counsel for the objector, the same legal position has

consistently been reiterated.

17. In *Sudarsan Trading Co. Vs. Government of Kerala and Another*, , it was noted that there are two different and distinct grounds involved in many of the cases - one is the error apparent on the face of the award and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the courts can look into the arbitration agreement, but in the former, it cannot, unless the agreement was incorporated or recited in the award. The same law is expressed in *M/s. Associated Engineering Company (supra)* in the following terms:-

"29. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award....."

18. In the instant case, there is, thus, no legal impediment in referring to the agreement between the parties even if the same is not incorporated or recited in the impugned award. Though para 4 of the Financial Terms & Conditions specifically prohibited escalation, the arbitrator proceeded to award LD. 18,120.00 on escalation count and thereby, transgressed the contractual barrier. The award is, thus, liable to be set aside in regard to claim No. 2 pertaining to escalation as arbitrator exceeded his jurisdiction by awarding the same in disregard of the contract.

19. To the claimant's prayer for translating the awarded amount from Libyan Dinar into Indian currency, there was no opposition from the side of the objector. The arbitrator omitted to provide for the rate of conversion from Libyan Dinar to Indian Rupee in his award in spite of the claimant making a specific request in that respect. Such omission on the part of arbitrator can be taken care of either by remitting the award u/s 16 of the Arbitration Act, 1940 for the purpose of fixing the rate of conversion or this Court may do so itself. Former course may result into unnecessary delay, hence, it would be appropriate for this Court itself to provide for the rate of conversion and fix the proper date therefore.

20. In *Forasol Vs. Oil and Natural Gas Commission*, , considering the question of selecting the proper date for fixing the rate of exchange at which the foreign currency has to be converted into the currency of the country in which the action for recovery is commenced and decided, the Supreme Court laid down:

"The court must select a date which puts the plaintiff in the same position in which he would have been, had the defendant discharged his obligation when he ought to have done, bearing in mind that the rate of exchange is not a constant factor but fluctuates, and very often violently fluctuates, from time to time."

Applying the aforesaid principle to different possible dates for fixing the rate of exchange for the purpose of conversion, the Supreme Court concluded:

"It would be fairer to both the parties for the court to take the date of passing the decree, that is, the date of the judgment, as the proper date for fixing the rate of exchange at which the foreign currency amount should be converted."

Accordingly, it is the rate of exchange on the date of the decree which is to be applied for conversion of awarded Libyan Dinar into Indian currency.

21. In the result, the objections are partly allowed to the extent the same relate to claim No. 2. regarding escalation and the award is set aside to that extent. Rest of the award is made rule of the court. The awarded amount of LD. 1,455.00 shall be payable to the claimant by converting the same into Indian currency at the rate of exchange prevalent on the date of the decree.

22. A decree be drawn accordingly.