

(2007) 07 DEL CK 0215

In the Delhi High Court

Case No : C.S. (OS) No. 3181 of 1988 and I.A. No's. 1961 and 2039 of 1989

Simplex Concrete Piles (India) Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 27-07-2007

Acts Referred:

Citation : (2007) 3 ARBLR 394 : (2007) 98 DRJ 735

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : V.P. Chaudhary and Sushma Sachdeva and Nitinjya Chaudhary, for the Appellant; Saleem Ahmed, for the Respondent

Judgement

Vipin Sanghi, J.—By this order I proceed to dispose of the objections filed by the parties before me to the Arbitral Award dated 31.10.1988, made by the sole Arbitrator, Shri J.P. Singhal.

2. Vide his letter dated 5th December 1988, the learned Arbitrator had filed the award in Court to be made a "Rule" of the Court. Both the parties to the award, i.e., the claimant and the respondent before the Arbitrator filed their objections on 15.2.1989 (registered as I.A. No. 1961/1989) and 7.2.1989 (registered as I.A. No. 2039/1989) respectively.

3. Brief facts leading to the passing of the award are that Union of India (referred to as "respondent" hereinafter) had invited tender for the work of construction of flyover at Lodhi Hotel inter-section, New Delhi at an estimated cost of Rs. 2,04,66,773/-. Work contract was awarded to M/s. Simplex Concrete Piles India (P) Ltd. (referred to as the "Claimant" hereinafter) for Rs. 2,48,85,564/- to be completed within a period of 16 months starting 1.1.1981. However, the work could not be completed in time, and was thus delayed by a month, though extension had been granted for, up to 31.12.1982.

4. Final Bill was raised and some deductions etc. were made to the amount claimed and consequently differences/disputes arose between the parties which

were referred to the sole Arbitrator.

5. The Claimant has objected to the award to the extent it fails to award pendente lite interest to it as an error apparent on the face of the award.

6. The respondent has challenged the award so far as it relates to claim nos.1, 2, 3, 5, 7, 13(iii) and 21.

Objections of Respondent:

7. Claim No. 1 for Rs. 28,30,000/- was made on account of reduction of capacity of piles by the Respondent/Department, i.e., from 110 tonnes to 80 tonnes, which resulted in increase in the number of piles by 82. It is alleged that the Arbitrator misconducted himself in coming to the conclusion that the Claimants had, in accordance with clause No. 2.5.5 of the additional condition to the agreement, offered a guaranteed safe load carrying capacity of 110 tonnes, inasmuch as, there was no acceptance of the above offer by the Respondent. On the contrary the requirement of Clause 2.5.3 of the agreement required the claimant to submit preliminary calculations for arriving at the size, length and load carrying capacity of the piles.

8. It is also argued that the arbitrator also misconstrued the provisions contained in clause No. 2.4.2 of the agreement at page 135 which was binding on the Claimant. The Arbitrator construed the clause to imply that trial bores and testing of soil samples was primarily necessary for checking design of retaining walls etc., where design of foundation was other than piles., whereas the words used in the said clause were "...for checking and final design of the foundations of flyover and its approaches at suitable location...." Thus no distinction was made by the arbitrator whether foundations were walls or concrete piles.

9. It is alleged that the Arbitrator also misconducted himself by holding that it was the field load test, which ought to have been regarded, and the process static formula adopted by the respondent ought to have been disregarded. As far as the field load testing was concerned the Arbitrator ignored the provisions of clause 5.8.3 and 5.8.4 of IS:2911 Part 1 Section 1 1979 regarding the factor of safety on the test load. The factor of safety adopted by the Claimant was `2" only, whereas it ought to have been "2.5". Thus, the Arbitrator erroneously upheld the contention of the Claimant that the fixation of capacity of piles as 80 tonnes by the Respondent and its intimation to the Claimant on 6.4.1981 was contrary to the provisions of the agreement. This was also in violation of Clause 4.3 of the agreement.

10. The Arbitrator also erred in concluding that the value of "K" i.e. the coefficient of the earth pressure fixed by the Respondent as "1" was not correct and the value of "K" adopted by the Claimants as "2" was correct. In arriving to this conclusion the Arbitrator disregarded and ignored the decision of a committee of 4 Chief Engineers and 4 Superintending Engineers assisted by the concerned executive Engineers under the Chairmanship of the Additional Director

General (Bridges), the highest technical authority on bridges of the Ministry of Surface Transport, Exh. No. R/155. Thus, the award of Rs.4,92,000/- against above claim deserves to be set aside.

11. The claimant had relied upon Clause 2.5.5 whereby it was for the claimant to lay down the safe load capacity of each pile and the tender bid was to be based on that guaranteed safe foundation. The Claimant has accordingly specified safe load carrying capacity of a 50 CM. dia pile as 110 tonnes. This, as per the Claimants, was duly established by the load test conducted on the piles. The reduction of capacity of each pile to 80 Tonnes from 110 tonnes by the Respondents vide letter dated 7.4.1981 was Therefore uncalled for. This led to an increase in the work of pile caps and consequently Claimant had to supply 82 extra piles than it would have supplied had it not been for the above reduction of capacity. Since the work of installation of piles was a part of the works covered under lump sum price, once the technical approach of design and execution of work was disclosed by the contractor in its offer and on that basis the offer was accepted, Therefore, it was not open for the Respondent to deviate from its stand.

12. Claim No. 2 was made on account of alleged increase in reinforcement. The Arbitrator proceeded to award a sum of Rs. 20,388/- against the claim of Rs. 57,500/- that was made. This is allegedly in violation of provisions of Clause 4.3 at pg 159 of the agreement which provides that any modifications to design suggested by Respondent in consultation with the Ministry of Shipping and Transport were to be carried out by the Claimants without any extra charge. As per the Claimant, the longitudinal reinforcement was increased arbitrarily without any relevance to the contract specifications and, thus the claim was justified.

13. Claim No. 3 is regarding the increase in the size of pile caps on account of increase in the number of piles. Claimants claimed Rs. 4,82,000/- on this account. The Arbitrator granted a sum of Rs.4,60,918/-. As per the respondent the Arbitrator has granted this claim on the basis of his decision on claim 1. If the award in respect of claim No. 1 is rejected, this claim would also fall. Further, the Arbitrator rejected the "Truss Theory" based on para Section 12 of IS:2911 Part 1 Section 1 and IS: 4556-1978. It is argued that the Arbitrator has not given any indication as to the basis of calculations of the amount awarded against this claim.

14. Claim No. 5 was on account of the two layers of water bound macadam laid under the approach slab and 75 mm thick layer of bituminous macadam on top of the approach slab which the Claimant had to lay. This, according to respondent was not done on the direction of the respondent but as an acute technical/contractual requirement. Since, as per contract, the top of each carriage way was to be kept at uniform level, and nothing was done beyond that, Therefore the award of Rs. 1,43,000/- to the Claimant was not justified.

15. Claim No. 7 pertained to construction of railing and items of work connected

therewith. The Claimant had preferred a claim of Rs.4,96,000/- under this head. Rs. 2.5 lakh was claimed on account of lump sum cost of 1 meter high railing provided on both sides of carriageway and the remaining amount on account of RCC fascia provided on the safety kerbs. While the former was rejected in toto, the claim on account of RCC fascia was accepted to the extent of Rs. 69,000/-. The respondents have challenged this on the ground that the Arbitrator ignored the specific provisions of the agreed drawing which formed part of the agreement in order to arrive at the above conclusion and nothing could have been awarded under Claim 7.

16. A bare perusal of the award in respect of claim Nos. 1,2,3,5 and 7, as well as the objections raised by the respondents, shows that they are touching upon the merits of the claims. Moreover, they deal with highly technical and engineering aspects of the contract. The parties to the contract entered into an engineering contract, to be executed by technicians and engineers. Since the disputes were of a technical nature, even the arbitrator appointed appears to be a person with technical background and know how from the Ministry of Urban Development, Government of India. I may notice that no oral arguments were advanced by the respondents in support of the objections on account of the highly technical nature of the claims, the award and the objections. He has rendered his award in respect of the aforesaid claims which, on the face of it, does not disclose an error apparent on the face of the record. It is not for this Court to sit as a Court of Appeal to re-appreciate the claims and counter claims/counter statements of the parties on merits. The Arbitrator has interpreted the terms of the contract and on that basis passed his award. Consequently, the objections in respect of the aforesaid claims are rejected.

17. Claim 13(iii) was made on account of escalation of labour wages during the currency of the contract. The Arbitrator awarded the entire sum of Rs.4,15,750/- claimed by the claimant under this head.

18. The Respondent has questioned the validity of the award so far as it relates to this claim on the ground that the same is in violation of Clause 10-C-3 of the agreement which specifically provides that the contractor shall be reimbursed with the actual expenditure incurred by the contractor on account of statutory increase in wages. It is contended that the Arbitrator awarded the said amount despite failure on the part of the Claimant to adduce evidence of the actual amount spent on account of increase in labour wages. The Arbitrator on his own calculated the supposed additional liability which according to him might have been incurred by the Claimant. Moreover, even though the Arbitrator reached the figure of Rs. 3,40,750/- as the amount payable as per his calculations, still he proceeded to award a sum of Rs. 4,15,750/-. Thus, it is argued that the decision on claim 13(iii) is totally unsustainable and perverse and liable to be set aside. To buttress this contention reliance has been placed on Associated Engineering Co. Vs. Government of Andhra Pradesh and another, .

19. In that case, the Hon"ble Supreme Court held that the Arbitrator acted

beyond his jurisdiction by traveling outside the permissible territory provided by the contract between the parties when the Arbitrator made an award in respect of a liability incurred on account of escalation in labour wages, contrary to the terms of the contract. It was observed:

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.

20. Coming back to the case before me, it may be relevant to examine provisions of Clause 10-C-3 of the Contract. The said clause reads as follows:

Labour:- If during the progress of the works, wages of labour increases as a direct result of the coming into force of any fresh law, or statutory rule or order and the contractor thereupon necessarily and properly pays 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 Superintending Engineer (whose decision shall be final and binding) attributable to delay in the execution of the contract within the control of the contractor.

Provided, however, no reimbursement shall be made if such increase has become operative after the contract or extended date of completion of the work in question.

...The contractor shall for the purpose of this condition, keep such books of account and other documents as are necessary to show the amount of any increase claimed or reduction available and shall allow inspection of the same by a duly authorised representative of Government and further shall, at the request of the Engineer-in-charge furnish, verified in such a manner as the Engineer-in-charge may require any documents so kept and such other information as the Engineer-in-charge may require.

The contractor shall, within a reasonable time of his becoming aware of any alteration in the price of any such wages of labour, give notice thereof to the Engineer-in-charge stating that the same is given pursuant to this condition together with all information relating thereto which he may be in position to supply.

21. The Arbitrator was bound to proceed on the basis of the evidence, if any, adduced in order to ascertain the liability of the respondent on account of labour escalation. I should not be read as holding that the claim was not admissible, for the contract did contain a stipulation as to reimbursement to contractor of the amount spent due to labour escalation. The error lies not in upholding the liability but in the manner the liability was ascertained, calculated and fastened on the respondent in contravention of the said Clause 10-C-3. No evidence was led by the claimant in support of this claim. There was no material on record

before the Arbitrator to award the amount of Rs. 4,15,750/- to the claimant. Thus, the award so far as claim 13(iii) is concerned, is vitiated by misconduct and liable to be set aside.

22. Claim 21 pertains to pre-suit, pendente lite and future interest on the awarded amount. The Arbitrator awarded pre suit interest (from 31.3.1983 till 23.8.1983) and future interest (from date of his award till payment) @ 10% per annum on Rs. 19,54,189/-. However, pendente lite interest was refused.

23. Both the parties i.e. respondent as well as the claimant have challenged the award so far as it relates to this claim. The respondent is aggrieved by the award of pre suit interest and contends that an arbitrator is not a court and Therefore, could not have awarded pre-suit interest. The Claimant, on the other hand, is aggrieved by the refusal by the Arbitrator to award pendente lite interest on the awarded amount.

24. The respondents contention is that the award, so far as it refuses pendente lite interest, is perfectly valid and in consonance with the law as it was interrupted at the relevant time. The award was passed before the decision of the Supreme Court in Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, was pronounced, and at the relevant time it was the decision in Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, which held the field. As per the said decision, Arbitrator was not considered a "court" and was Therefore not considered competent to award pendente lite interest. Moreover, even when the decision in Abhaduta Jena (supra) was overruled by G.C. Roy (Supra) it was prospectively overruled. The Supreme Court restricted the application of G.C. Roy (supra) to pending proceedings. Since the Award had already been passed, G.C. Roy (supra) would not apply to the present case.

25. The claimant on the other hand has not disputed that G.C. Roy(supra) is to be given effect prospectively and it would only apply to matters pending at the time the said decision was pronounced. His contention is that since these objections filed by both the parties were already pending before this Court, when the said decision was pronounced, G.C. Roy (supra) would apply to this case.

26. The question that needs to be answered is whether proceedings for making the award rule of the court are "matters pending" as contemplated by the court in G.C. Roy's case (supra)"

27. A matter may be considered to be not pending when it has been finally disposed of by a court or authority and nothing more needs to be determined/or nothing survives for determination. In case of an Arbitration Award made under the 1940 Act, a peculiar feature of the award is its un- enforceability till it is made Rule of the court/decreed by a court. Therefore, every award passed has to be filed before the court and the court is duty bound to give notice to the parties and consider the objections, if any, raised by any of the parties against the award. [See Pradeep Anand Vs. I.T.C. Ltd. and Others, Even if no objections are

filed by any of the parties, the court is still obliged to consider whether the award calls for interference or not, and if not, whether to make it a Rule of the Court. It is only when the award is made a `Rule" of the Court and a decree is passed which has attained finality, can it be said that the proceedings have become final. [See Union of India and Others Vs. Manager, M/s. Jain and Associates, .

28. Therefore, till the objections filed in pursuance of the notice of filing of the award in court are pending, or awards has not been made decree of the court, it cannot be said to be final. Similarly, if an appeal is preferred from the decision of the court making the award a `Rule" of the Court, or allowing all or any of the objections to the award, since an appeal is a continuation of the original proceedings, it would follow that the award would still not be considered as "final". In DDA v. Wee Aar Constructions Builders and Anr. 2004 VIII AD (Del) 33 and Sudhir Brother v. DDA 2001 II AD (Del) 325 , this Court has also applied the decision in G.C.Roy (supra) to cases similar to the present. I may also refer to the decision of the Supreme Court in M/s. M.K. Shah Engineers and Contractors Vs. State of Madhya Pradesh, . The Supreme Court, while granting pendente lite interest observed as follows:

In the cases at hand, the awards have not been made rule of the court so far and are being so made by the court today. The award of interest pendente lite by the arbitrator deserves to be sustained.

29. In view of the above discussion, there is no merit in the submission of the respondent and the petitioner is held to be entitled to pendente lite interest (during arbitration proceedings) on the awarded amount @ 10% per annum.

30. As far as pre-reference interest is concerned, the respondent has contended that since no notice under the interest Act was received from the claimant, the arbitrator acted beyond his powers in awarding pre-reference interest. The claimant has in reply relied on Ex. C-91, dated 17.9.1982 which has also been relied upon by the Arbitrator while awarding pre suit interest. Since the Arbitrator has come to this conclusion on the basis of the evidence adduced before him, it is not for this Court to interfere in the award so passed. Thus, grant of pre-reference interest cannot be disturbed by this Court.

31. Consequently, the objections of the respondents to claim No. 21 is rejected while the objections to the non grant of pendente lite interest raised by the claimant is allowed.

32. In view of the aforesaid, the award passed by the learned arbitrator is made a rule of the Court and the decree is passed in terms thereof except in respect of claim No. 13(iii). To that extent the award is set aside. The claimant shall also be entitled to pendente lite interest @ 10% per annum.

33. The claimant shall also be entitled to future interest from the date of the decree till payment or realization @ 8% per annum, in case the decretal amount is not paid within three months from today.