
(2012) 11 DEL CK 0083
In the Delhi High Court
Case No : O.M.P. No. 491 of 2009

Sri Ram Sayal and Sons Engineers Pvt. Ltd.	APPELLANT
Vs	
M/S. Indian Railway Construction Company (Ircon)	RESPONDENT

Date of Decision : 01-11-2012

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2012) 11 DEL CK 0083

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : S.S. Jauhar, for the Appellant; K.R. Gupta and Mr. Santosh Kumar, for the Respondent

Judgement

Justice S. Muralidhar

IA No. 4392 of 2010

1. These are objections filed by M/s. Indian Railway Construction Company ("IRCON") under Sections 30 and 33 of the Arbitration Act, 1940 ("Act") to an Award dated 14th July 2009 passed by the sole Arbitrator in the disputes between IRCON and the Petitioner, Sri Ram Sayal & Sons Engineers Pvt. Ltd. ("SRS") arising out of a contract executed between the parties, in terms of which the work of widening and strengthening of four lanes between a portion of National Highway ("NH") No. 1 was awarded by IRCON to SRS. The main work in relation to the project of construction of four-lane road was awarded by Punjab Public Works Department ("PPWD") to IRCON. In turn, IRCON appointed two sub-Contractors for the said work and one of the sub-Contractors was SRS. According to IRCON, SRS stopped work for more than one year, although the period of completion of work was three years. The disputes between the parties were initially referred to the sole arbitration of Justice T.P.S. Chawla (Retd.). It is stated that although Justice Chawla had finalized his Award, he expired before the Award could be signed. Subsequently, the disputes were referred to another former Judge of this Court, Mr. Justice R.C. Chopra.

2. 18 items of claims were filed before the learned Arbitrator. However, by an application dated 10th March 2008, SRS gave up 7 claims, viz., Claim Nos. 4, 8, 9, 10, 11 (partly), 15 and 18. SRS also reduced the amounts claimed under Claim Nos. 1, 2, 3, 5, 6, 7, 11, 13, 16 and 17. The issues framed by the learned Arbitrator were as under:

(1) Whether the claimants or the respondents were in breach of the contract between them which has given rise to the disputes subject matter of the present reference to arbitration?

(2) To what amount, if any, is the party not in breach of the said contract entitled?

(3) Whether the counter-claims made by the respondents form part of, and can be entertained in, the present reference to arbitration?

(4) Are the counter-claims made by the respondents barred by time?

(5) Whether the party found entitled to compensation, if any, is entitled to interest; and, if so, at what rate?

(6) Relief.

3. On Issue No. 1, it was held by the learned Arbitrator that SRS (the Claimant) had not abandoned the work as alleged by IRCON and, in fact, had been compelled to walk out of the contract on account of obstacles and hindrances not attended to by PPWD or IRCON despite repeated requests by SRS. Accordingly, it was held that it was IRCON which had failed to fulfil its obligations and to provide an obstruction free site to SRS for completion of the work. Thereafter, the learned Arbitrator proceeded to take up the claims and counter claims.

4. Under Claim No. 1, SRS had initially sought a sum of Rs. 93,56,398 for work done together with interest thereon. By way of an amendment, this claim was enhanced to Rs. 1,10,07,459. However, by way of the application dated 10th March 2008, SRS restricted the claim to a lump sum amount of Rs. 5,00,000 in respect of Claim Nos. 1(a) to 1(e). As regards Claim No. 1(f) for withheld amounts, SRS pressed for Item Nos. 6, 7, 8, 9 and 15 only. As regards Claim No. 1(h) for escalation, SRS claimed a sum of Rs. 5,34,852. Against Claim Nos. 1(a) to (e), the learned Arbitrator awarded SRS a sum of Rs. 5,00,000. As regards Claim No. 1(f), a sum of Rs. 1,50,000 was awarded. Under Claim No. 1(h), a sum of Rs. 5,00,000 was awarded. Thus, a total sum of Rs. 11,50,851 was awarded in respect of Claim No. 1.

5. Claim No. 2 was for a payment of truncated amount of mobilization advance in the sum of Rs. 9,32,760. By the application made on 10th March 2008 SRS restricted its claim to interest in the sum of Rs. 4,50,000 and gave up the remaining amount. SRS was held entitled to a sum of Rs. 96,000.

6. Claim No. 3 was for recovery of sum paid to the other Contractor under orders of IRCON in the sum of Rs. 3,16,314. The claim was restricted to Rs. 1,03,701.

The claim was rejected. Claim No. 4 was given up. Claim No. 5 was for a sum of Rs. 25,89,469 towards reimbursement of expenses incurred towards purchase and installation of wet mix plant. The claim was restricted to Rs. 5,50,000. The said claim was rejected.

7. Claim No. 6 was on account of expenses incurred in providing site infrastructure. The amount initially claimed was Rs. 16,94,824. Later, it was restricted to Rs. 2,11,900. SRS was held entitled to a sum of Rs. 1,88,000 only. Claim No. 7 was initially for a sum of Rs. 7,74,665 towards the cost of material lying at the site. This was restricted to Rs. 34,262 and was awarded as such to SRS.

8. Claim Nos. 8, 9 and 10 were entirely given up. Under Claim No. 11 towards amount incurred due to suspension of work, SRS had initially claimed a sum of Rs. 1,29,58,307. By way of the application dated 10th March 2008, SRS restricted its claim to Rs. 20,00,000 and gave up the rest of the claim. The learned Arbitrator awarded SRS a sum of Rs. 7,50,000 under the said claim.

9. Claim No. 12 was given up. Under Claim No. 13, Rs. 55,50,000 was initially claimed towards the loss of profit on the balance work. This was restricted to Rs. 55,00,000. A sum of Rs. 30,00,000 was awarded towards the loss of profit on the balance work. Claim No. 14 was for a sum of Rs. 1,09,000 towards the cost of trees and plants ("T & P") taken over by IRCON after 24th October 1989. This was allowed by the learned Arbitrator.

10. Claim No. 15 was given up. Claim No. 16 was for a sum of Rs. 8,33,528 for release of the security amount. This was restricted to Rs. 3,50,000. A sum of Rs. 3,00,000 was awarded to SRS. Under Claim No. 17, the claim for losses incurred due to prolonged upholding of the bank guarantees ("BGs") in the sum of Rs. 23,30,734 was restricted to Rs. 15,00,000. The claim was rejected.

11. Claim No. 18 was given up. Under Claim No. 19, the learned Arbitrator awarded SRS a sum of Rs. 10,00,000 as costs. Under Claim No. 20, the learned Arbitrator awarded SRS simple interest @ 9% per annum during the period from 1st July 1990 to 24th March 2000, pendente lite interest @ 9% per annum from 25th March 2000 to the date of the Award and future simple interest @ 9% per annum from the date of the Award till the date of payment.

12. Issue Nos. 3 and 4 were taken up together. As regards the counter claims of IRCON, the learned Arbitrator held that IRCON was under Counter Claim (A) entitled to Rs. 28,23,290.85 out of the mobilization advance and Rs. 10,59,000 in respect of the loan advanced by IRCON for the purchase of machinery. However, as regards interest on the aforesaid amounts, the learned Arbitrator held that he was not inclined to award interest @ 18% per annum for the reason that with effect from 1st January 1990 "the interest should be computed at an appropriate rate".

13. Counter Claim (B) for a sum of Rs. 2,86,63,160 being the reimbursement of

the cost incurred for getting the left over work done by some other Contractor at the risk and cost of SRS, was rejected. Counter Claim (C) for costs of Rs. 10,00,000 was also rejected. Claims regarding cost and interest payable to SRS were decided under Issue No. 2. Issue No. 5 was also decided accordingly.

14. This Court has heard the submissions of Mr. S.S. Jauhar, learned counsel for SRS and of Mr. K.R. Gupta, learned counsel for IRCON.

15. The first objection raised by IRCON is in relation to Claim Nos. 1(a) to 1(e), under which the learned Arbitrator has awarded SRS a sum of Rs. 5,00,000. As noted in the impugned Award itself, by way of its application dated 10th March 2008, SRS had restricted its claim to a lump sum of Rs. 5,00,000, and that too only in respect of Claim Nos. 1(a) to 1(e). Claim No. 1(a) was for removal of burnt coal ash.

16. In the synopsis of arguments filed in the arbitral proceedings, IRCON pointed out that "In the arbitration between IRCON and Punjab PWD vide award dated 18.08.2001, a sum of Rs. 2,01,100/- has been awarded (claim no. 22, pages 61 & 62 of award) (page 219/220) in favour of IRCON for removal of ash etc. Out of this amount a sum of Rs. 26,271.70 after deducting 10% as IRCON's share, becomes payable to SRS on back to back basis. A statement containing calculations in this behalf was filed by IRCON in these proceedings on 15.10.2005 in a folder along with other documents" and IRCON further pointed out on the basis of its statement of defence that "IRCON have lodged a claim in the arbitration against PWD. If and when any additional payment is received from PWD consequent upon the said arbitration, IRCON will duly pass on SRS's share to them."

17. In the impugned Award, the learned Arbitrator has noted only a part of the submissions of IRCON that a sum of Rs. 2,01,100 was awarded in its favour by the Award dated 18th August 2001 in the arbitration between IRCON and PPWD for removal of ash. The other submission that only a sum of Rs. 26,271.70 was payable, after deducting IRCON's share, was not even noticed by the learned Arbitrator. Further, the learned Arbitrator has failed to quantify the sum that SRS was entitled to. All that was said is that SRS "is therefore entitled on the basis of the said rates irrespective of the outcome of the Arbitration between the respondent and Punjab PWD". The learned Arbitrator also failed to note the distinction between IRCON's recommendation of the rate for removal of coal ash and its approval of such rates. The Court, therefore, holds that in terms of Claim No. 1(a), SRS is entitled to a sum of Rs. 26,271.70.

18. Under Claim No. 1(b), which was for repeated site clearance and grubbing of roots on account of defilement of the site due to holding of Animal (Cattle) and Claim No. 1(c) for grubbing of vegetation, the learned Arbitrator did not give reasons except stating that the "claimant had to do site clearance, grubbing and filling up of the grubbed up ground repeatedly." Also, the learned Arbitrator appears to have clubbed Claim Nos. 1(b) and 1(c). Learned counsel for IRCON

has pointed out, and with justification, that SRS had in its letter dated 6th July 1988 (Ex. C-67), limited the rectification costs to Rs. 5,000 for each instance. Since the extra clearing work was carried out admittedly only on two occasions, SRS was entitled to Rs. 10,000. The learned Arbitrator has not explained on what basis he came to the conclusion that the claims under Claims 1(b) and 1(c) "have been worked out for a sum of approx. Rs. 7 lacs." Under Claim No. 1(c), IRCON has pointed out the work of grubbing of the vegetation was part of the work under Item 1.05 of the bill of quantities ("BOQ") read with MOST Specification Clause 201.1. This was not even noticed by the learned Arbitrator. Consequently, while setting aside the Award in respect of Claim No. 1(c), this Court restricts the amount payable to SRS under Claim No. 1(b) to Rs. 10,000.

19. Claim No. 1(d) was due to accumulation and overflowing of water around the junction of the main highway. IRCON's case was that this Claim was not tenable as it was barred by Clause 20(1) of the contract. This was not dealt with by the learned Arbitrator. Under Claim No. 1(e), SRS had claimed that it had dozed off in two operations the factory wastes which had re-accumulated in big heaps at the site after clearance of earth work. IRCON had denied the claim as being false and fictitious. Further, SRS had raised this claim on 10th February 1990 for the first time, long after abandoning the work and leaving the site. The learned Arbitrator clubbed Claim Nos. 1(d) and 1(e). He termed the limiting of Claims 1(a) to 1(e) by SRS to Rs. 5,00,000 to be "quite reasonable and fair claim." This Court is unable to sustain the award of Rs. 5,00,000 under Claim Nos. 1(a) to 1(e), as it is not based on any reasoning, discussion of the relevant clauses or the contentions of the parties.

20. The Court holds that SRS is entitled to Rs. 26,271.70 under Claim No. 1(a) and Rs. 10,000 under Claim No. 1(b). The amount of Rs. 5,00,000 awarded by the learned Arbitrator against Claim Nos. 1(a) to 1(e) is hereby set aside.

21. Under Claim No. 1(f), SRS had itself limited its claim to Items 6, 7, 8, 9 and 15. The precise claim of SRS against the above items was as under:

22. It is not understood as to how the learned Arbitrator allowed SRS Rs. 1,50,000 explaining that the said amount "to my mind would satisfy the claimant." Merely because the claim was reduced to Rs. 1,50,000, it did not mean that the said amount had to be awarded. Consequently, the amount of Rs. 1,50,000 under Claim No. 1(f) is set aside. SRS is held entitled to Rs. 25,808 as claimed.

23. Claim No. 1(g) was for interest and Claim No. 1(h) was for escalation. IRCON submits that by an order dated 31st August 2007 the learned Arbitrator had directed SRS to file a corrected additional sub-Claim No. 1 within two weeks, as there was no earlier claim for escalation when Justice Chawla was the learned Arbitrator. SRS did not comply with this direction and yet Claim No. 1(h) was allowed in the sum of Rs. 5,00,000. It is contended by IRCON that no amended claim was filed and, therefore, no opportunity was given to IRCON to contest

additional Claim No. 1(h). On the other hand, it is contended by SRS that the claim for escalation and work done was already made by way of amendment before Justice Chawla and IRCON had not objected to it. Also, according to SRS, there was enough evidence on record in the shape of measurement books ("MBs"). SRS was able to demonstrate that work in the value of Rs. 1,97,116 was done by it which was recorded by IRCON in the MBs and included in Running Account ("RA") Bill Nos. 7, 8 and 10.

24. The decision of the learned Arbitrator as regards Claim No. 1(h) appears to be a plausible view to take. It is not denied that the claim already stood amended before Justice Chawla and, therefore, there was an opportunity given to IRCON already to deal with it. Consequently, the objection in respect of Claim No. 1(h) is rejected.

25. It is next submitted that the learned Arbitrator failed to allow interest to IRCON on the advances made to SRS. As rightly pointed out, the learned Arbitrator held that the interest should be computed at an appropriate rate. He, however, failed to deal with it in the operative portion of the Award while awarding pre-reference, pendente lite and post-Award interest. Consequently, this Court holds that IRCON would be entitled to simple interest @ 9% per annum on the sum of Rs. 38,82,290 from 1st January 1990 till the date of the Award. Correspondingly, SRS would also be entitled to pre-reference, pendente lite and post-Award simple interest on all the sums awarded to it under the impugned Award, as modified by this order.

26. IRCON is justified in objecting to the award of Rs. 10,00,000 as costs. It is seen that SRS gave up 7 of its claims out of a total of 18 claims and considerably reduced the amounts in respect of other claims. Only some of these were allowed and some were rejected. In the circumstances, the awarding of Rs. 10,00,000 as costs to SRS was not justified and is hereby set aside.

27. In conclusion, this Court modifies the impugned Award as under:-

(i) The Award under Claim Nos. 1(a) to 1(e) in the sum of Rs. 5,00,000 is set aside. Instead, it is held that SRS is entitled to a sum of Rs. 36,271.70 under Claim Nos. 1(a) and 1(b) and the claims under Claim Nos. 1(c) to 1(e) are rejected.

(ii) The amount of Rs. 1,50,000 under Claim No. 1(f) is set aside. SRS is held entitled to Rs. 25,808 under Claim No. 1(f).

(iii) The amount of Rs. 5,00,000 under Claim No. 1(h) is upheld.

(iv) IRCON is held entitled to simple interest @ 9% per annum on the sum of Rs. 38,82,290 awarded in its favour from 1st January 1990 till the date of the Award. Correspondingly, it SRS would also be entitled to pre-reference, pendente lite and post-Award simple interest on all the sums awarded to it under the impugned Award, as modified by this order

(v) The amount of Rs. 10,00,000 awarded as costs in favour of SRS is hereby set aside.

(vi) Each of the parties will bear their own costs.

The Award, as modified in the above manner, is made rule of the Court. Decree sheet be drawn up accordingly. The petition and the application stand disposed of.