
(2002) 12 KL CK 0075
In the High Court Of Kerala
Case No : M.F.A. No. 1096 of 1996

State of Kerala and Another

APPELLANT

Vs

K. Manikantan Nair

RESPONDENT

Date of Decision : 19-12-2002

Acts Referred:

Arbitration Act, 1940 — Section 30, 30

Citation : (2002) 12 KL CK 0075

Hon'ble Judges : Pius C. Kuriakose, J;K.A. Abdul Gafoor, J

Bench : Division Bench

Advocate : Roy Chacko, Government Pleader, for the Appellant; S. Sreekumar, for the Respondent

Final Decision : Allowed

Judgement

K.A. Abdul Gafoor, J.—There was a contract between the Appellant and the Respondent. The Appellant is the State and the Respondent is the contractor. The contract was entered into on 19th April 1986. That contract stipulates certain rates for the extra items of work and the limit of extra items of work beyond which the contractor will be entitled to additional rates. As per the said agreement the work had to be completed by 27th November 1986. The site was handed over on 28th May 1986. The contractor could not complete the work in time. According to him, there was delay in supplying the materials and facilitating the work by the Appellant/State. Whatever that be, the contractor had as of his own, made an application on 14th November 1986 requesting the Government to extend time for completion of the work till 31st March 1987 and the Government was benevolent enough to grant this extension and consequently, a supplementary agreement was executed by the contractor on 30th January 1987, undertaking that the work would be completed before 31st March 1987, the date suggested by the contractor himself in his request for extension of time. It is an admitted case before us that the contractor could not complete the work on or before 31st March 1987. Of course, the contractor has

got his own allegations against the State that the State was instrumental for that. Whatever that be, the contractor had again on 20th March 1987, with both eyes open, made a request to the Government to extend the time beyond 31st March 1987 for three months until 30th June 1987. The contractor made such an application with the hope that he will be given that extension. The extension was granted and another supplementary agreement was entered into by the contractor, again, on 23rd June 1987 with both the eyes open and agreeing to complete the work before 30th June 1987. the date suggested by him in his letter dated 20th March 1987. Same has been repeated once again. There was a further supplementary agreement on 31st August 1987 executed by the contractor agreeing that he would; complete the work by 30th September 1987. When thus successively, the contractor had applied for extension of time and executed supplementary agreements agreeing for completion of the work within the extended time suggested by himself, whatever be the reason now attributed, the contractor cannot say that the State was responsible for the delay. Even then the contractor could not complete the work even by 30th September 1987. The State therefore terminated the contract. It was thereupon, the dispute arose and the dispute was referred, by mutual consent, to the Arbitrator on different points.

2. The Arbitrator upheld the claim under items 1, 2, 9 and 12, which are the subject-matter of this appeal. Item No. 1 relates to extra rate for the extra work and Item No. 2 relates to the compensation for the damages suffered by the contractor by reason of the delay in completing the work on account of the delay on the part of the Government and the department and Item No. 9 relates to the illegal termination of the contract and item No. 12 relates to disbursal of the amount withheld as also the security amount. Item No. 12 is, thus, consequent to item No. 9.

3. These findings by the Arbitrator were challenged by the State by filing an application u/s 30 of the Arbitration Act, 1948 contending that the Arbitrator had misconducted in arriving at the findings in respect of the said items as the said findings are beyond the scope of the agreement, determining the rights and liabilities of the parties.

4. These contentions were not found favour with by the court below. Therefore, this appeal at the instance of the State.

5. It is contended by the State that the original agreement which saved the conditions regarding Local Competitive Bid specifically stipulated in Clauses 31 and 32 thereof that extra rates will be available to the extra work over and above that had been agreed to in the original agreement, if the quantity of such extra work exceed 30 per cent. The Arbitrator himself has found that the extra work performed by the contractor was only by 30 per cent. On the basis of that finding, the Arbitrator awarded extra rates for the extra work. This is beyond the contract and stipulations contained in Local Competitive Bidding conditions.

6. It is further contended that when the contractor himself had applied for time,

consecutively thrice, for completing the work and the time had been granted by the Government as requested by him, the contractor cannot contend that the State was responsible for delaying the work. Even if there was delay, the contractor has acquiesced to it. That is why, he had made application for extension for completing the work and the Government extended the time as requested by him. Moreover, even in the 3 Supplementary agreements executed by the contractor, consequent to sanction of extensions of time to complete the work, it had been specifically agreed in Clause 2 of the supplementary agreements that no additional rate would be claimed. Thus the extensions were at the risk of the contractor himself and at the request of the contractor. Having done so and obtained consecutive extensions thrice, the contractor cannot contend that there was idling of men and machinery and consequent loss and damages. Therefore, the Arbitrator ought not have allowed the claim under head 2 towards compensation for damages.

7. It was further contended by the Government Pleader that extension was granted on three consecutive time upon request of the contractor. The last extension envisages that the contractor shall complete the work by 30th September 1987. That date also was one suggested by the contractor himself. Even in spite of that and in spite of the three consecutive extensions granted, virtually at the risk of the contractor, the contractor did not complete the work. In such circumstances, no one can find fault with the Government in terminating the contract and the termination cannot be stated to be illegal because time was extended at the request of the contractor and the work was not completed even within the extended time. Therefore, the termination of the contract was justified. When there is a justified termination the Government Pleader submits that there arise no question of release of the amount withheld and that the forfeiture of the security amount exercising the powers vested with the Government and the department in terms of the terms and conditions contained in the agreement between the parties is well justified.

8. At the same time, it is contended by the contractor that the contractor had to apply for extension of time as the Government did not supply the materials. It is further submitted that when there is no supply of materials, necessarily, the men and machinery had to be idled. There was hike in the cost and there was escalation of price. Consequently that shall be compensated by the Government. It is further submitted that when the extra item of work had upto 30 per cent, there is no illegality in applying Clauses 31 and 32 of the L.C.B. Conditions to grant additional rate or extra rule for the extra items of work. It is further contended that the termination of the contract was illegal. The contractor could not complete the work only because of the fault of the State and therefore, the contractor ought to be absolved of the liability and relieved of the burden of the contract. Merely because, the contractor had under compelling circumstances made application for extension, the delay cannot be attributed on him. There is no reason to withhold amount or to forfeit the security amount. Therefore, the court below was fully justified in affirming and confirming the award and to pass

a decree in terms of the award.

9. As held by the Supreme Court in the decision reported in Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, the Arbitrator is the creature of the agreement and he cannot go beyond the terms of the agreement between the parties. Any award passed transversing beyond the agreement is certainly a misconduct and liable to be set aside on account of jurisdictional error which also amounts to misconduct.

10. It is not in dispute that the L.C.B. conditions form the terms of the agreement. Clauses 31 and 32 read together makes it clear that the contractor will be entitled for extra rates if the additional work is beyond 30 per cent of the original work. The Arbitrator has categorically found under item 1 that "several items come within the category of variation of quantities by 30 per cent and of extra items and hence fall under the purview of the said Clauses 31 and 32". On the otherhand Clause 31 of the L.C.B. conditions clearly stipulates that "should quantities of work actually involved under any item exceed quantities provided in the tender by more than 30 percent the rate of such excess over 30 per cent of quantity provided in the tender may be revised in accordance with the procedure indicated under clause "Extra Item". So revision is permissible only when there is excess of 30 per cent of the quantity provided in the original tender or agreement. As found by the Arbitrator himself, the excess is only by 30 per cent. Necessarily the said clauses do not have application to mutually agree upon a higher rate in respect of the excess quantities of work. The finding of the arbitrator is thus beyond the agreement conditions which include Clause 31 of the L.C.B. conditions as well. Thus the Arbitrator has gone beyond the agreement to award the amount in terms of claim No. 1. It is a jurisdictional error, sufficient for interference by court as held in Rajasthan State Mines and Minerals Ltd.s" case (supra)

11. Point No. 2 is in respect of the compensation and damages claimed by the contractor on account of the alleged delay on the part of the Government. The Government had committed breach, of contract in not supplying the materials in time, the contractor alleged. It was submitted before the arbitrator by the contractor that he had to complete the extra items first. Therefore, there was delay in completing the work. That cannot be attributed as a fault of the State. The delay occasioned as the extra items had to be completed first. If extra items had to be completed first, it was incumbent on the part of the contractor, to provide sufficient men and machinery. So, it cannot be stated that the State was at fault for the delay caused. It was with the both eyes open that the contractor had applied for, indicating the final dates, three extensions and, it was again with both the eyes open that he had executed three supplementary agreements agreeing to complete the work within the respective extended time frame. Having so agreed voluntarily, the contractor cannot seek damages. If so he should have insisted to provide it in the supplementary agreements, In such circumstances, the finding under Clause 2 is also beyond the scope of the

agreement and the supplementary agreements

12. Item No. 9 is with regard to the termination of the contract. It is an admitted fact that there were three extensions at the instance and requests of the contractor and even by the date fixed in the third supplementary agreement, the work could not be completed. In such circumstances, if the contractor could not complete the Work, in spite of three consecutive extensions granted upon his request, the termination cannot be styled as improper. When the contract is so terminated, necessarily the consequences arising out of such termination in terms of the agreement entered into between the parties including withholding of the security amount or withholding any payment are the obvious results. It cannot be stated to be unjustified. Therefore, the findings by the Arbitrator under item No. 9 and consequential item No. 12 are also beyond the agreement.

13. Necessarily, the court below ought to have upheld the objection with regard to these items in the petition u/s 30 of the Arbitration Act, 1940.

Accordingly, we allow this appeal and set aside the Judgment of the court below vacating the findings of the Arbitrator in respect of items 1, 2, 9 and 12. Consequences follow. No costs.