
(2005) 06 MP CK 0034
In the Madhya Pradesh High Court
Case No : C.R. No. 1834 of 1998

State of M.P. and another

APPELLANT

Vs

Rajendra Kumar Bhalla

RESPONDENT

Date of Decision : 28-06-2005

Acts Referred:

Madhya Pradesh Works Department Manual — Clause 2.40.1

Citation : (2006) 2 MPLJ 234

Hon'ble Judges : S.R. Waghmare, J;Arun Mishra, J

Bench : Division Bench

Advocate : P.N. Dubey, Dy. A.G, for the Appellant; V.R. Rao, for the Respondent

Final Decision : Allowed

Judgement

Arun Mishra, J.

The only question raised by Learned Counsel for the parties is about escalation. Admittedly, there is no provision in the agreement with respect to payment of escalated costs. In the absence of provision provided for the escalation, it is not open for the contractor to claim the amount. We have considered various decisions in C.R. No. 1205/1994, Jhamandas Lalwani v. Government of M.P. and Ors., decided today i.e. 28-6-2005 :

Shri V. R. Rao has submitted that the escalation charges ought to have been awarded by the learned Arbitration Tribunal. He has submitted that the contract is subject to M.P. Works Department Manual. He has placed implicit reliance on Appendix 2.40 para 2.40.1 where price adjustment has been provided. He has submitted that as per the Appendix 2.10.A which has been made applicable to all the departments including the Public Works Department, Public Health Engineering Department and Irrigation Department, escalation is admissible. Thus in the absence of specific term entered in the agreement between parties, with respect to the contract in question, the escalation is admissible as per the aforesaid provision. Hence, the Tribunal erred in law in rejecting the claim on the

ground that there is no clause in the agreement providing for payment of escalated costs.

Shri O. P. Namdeo, learned Standing Counsel, appearing on behalf of the respondents has submitted that in view of the specific agreement entered between the parties for which there is no provision made for payment of escalated costs, it is not admissible. He has placed reliance on the Apex Court decisions in *State of Orissa v. Sudhakar Das (Dead) By LRs.*, (2000) 3 SCC 21 and *Ramachandra Reddy and Co. Vs. State of Andhra Pradesh and Others*, .

A perusal of the agreement indicates that there is no provision made in the agreement for payment of escalated costs. What is provided under clause 4.3.13.3 (b) of the agreement is that in case quantity exceeds 10% of the agreed quantity, in that case it enables to determine the rate of the extra work. However, aforesaid clause does not deal with escalation. Escalation is prayed for by the petitioner on account of increase in costs of labour and Petroleum, Oil, Lubricants etc (POL). The clause 2.40.1 of M.P. Works Department Manual which has been relied upon by Shri Rao reads thus :

Price Adjustment 2.40.1. No claim for price adjustment on account of any reason whatsoever shall be entertained if construction period as per Notice Inviting Tenders is not more than 12 months. If construction period is more than 12 months the amount paid to the contractor for work shall be adjusted quarterly for increase or decrease in the rate of labour, material and P.O.L. Excepting those materials supplied by the government (as per Annexure L). For this purpose quarters would be January to March, April to June, July to September and October to December and the month/date of opening tenders the month/date prescribed in N.I.T. for opening the tender.

M.P. Public Works Department Manual only provides that it is permissible to give escalation. Whenever an agreement is entered into either there is provision made for escalation or it is open to the parties, to agree otherwise. In our opinion, in the absence of escalation clause in agreement entered in to, it is not open to award any sum on account of escalation. We find support in our conclusion from decision of the Apex Court rendered in *State of Orissa v. Sudhakar Das (Dead) By LRs.* (supra), that where there was no escalation clause in the arbitration agreement, there was no jurisdiction to award any amount towards escalation. The grant of escalation was held to be a patent error. Apex Court held :

2. It is not disputed that the arbitration agreement contained no escalation clause. In the absence of any escalation clause, an arbitrator cannot assume any jurisdiction to award any amount towards escalation. That part of the award which grants escalation charges is clearly not sustainable and suffers from a patent error. The decree, insofar as the award of escalation charges is concerned, cannot, therefore, be sustained.

In *Ramchandra Reddy & Company v. State of A.P. and Ors.* (supra) the Apex

Court has held that if the contract does not provide either expressly or by implication for escalation, contractor will not be entitled to an escalation. The Apex Court held :

7. In the case of S. Harcharan Singh Vs. Union of India, , on which Mr. Rao had strongly relied, this Court had quoted clause 12 of the agreement in para 8 of the judgment and referring to the standard form of contract of the Central Public Works Department, specifically permitting for a limit of variation called "deviation limit" up to a maximum of 20 per cent, it was held that the contractor has to carry out the work at the rate stipulated in the contract up to such limit but for work in excess of that limit he has to be paid at the rates to be determined in accordance with clause 12-A, under which the Engineer-in-charge can revise the rates, having regard to the prevailing marked rates. The Court also referred to the letters of the Executive Engineers, the Superintending Engineer and the Additional Chief Engineer recommending that the additional work may be confined to 20 per cent and for the extra quantity of additional work, he may be paid remuneration at the increased rate taking into account the increased costs of the execution of work on account of the peculiar nature of the work. We fail to understand how the aforesaid decision will be of any assistance to the claimant in the present case, where there is no clause like clause 12-A nor is there any letter from the competent authority agreeing to payment at a higher rate for the additional work beyond the limit of 25 per cent as provided under GOMs No. 2289 dated 12-6-1968. An arbitrator being a creature of the agreement, unless the agreement either specifically or inferentially provides for a higher rate to be awarded for any additional or excess work done by the contractor, it would not be permissible for the arbitrator to award for the so-called additional work at a higher rate. In the case in hand, not only is there no letter from the competent authority, namely, the Superintending Engineer that the contractor would be paid at any higher rate for the additional excavation of rock, though the Executive Engineer had indicated that he has recommended to the Superintending Engineer. But such 4 recommendation of the Executive Engineer, who was not competent to decide the question of awarding a higher rate for the excess quantity of excavation will not clothe (sic confer) any jurisdiction on the arbitrator to award the contractor at a higher rate nor would it entitle the contractor to get a higher rate for the claim in question on the basis of agreement. Now coming to the very clause, upon which Mr. Rao relied, we find that the said clause relates to supplemental items, which have been found essential, incidental and inevitable during the execution of the work. The excavation of hard rock cannot be held to be a supplemental item and, on the other hand, it is an item of work tendered and accepted, and as such clause 63 will have no application to Claim Item 1. Mr. Rao had also relied upon the decision of this Court in National Fertilizers Vs. Puran Chand Mangia [OVERRULED], , wherein this Court had held that an interpretation of a particular clause of the agreement must be such, so as to balance the rights of both the parties and when a variation clause permits the employer to make variation in

the work up to a specified limit, beyond the said limit the claimant could be paid at a higher rate. The Court in the aforesaid case was examining the principle of integrity of the contract and refused to interfere with the award merely because the arbitrator had granted an escalation. In the aforesaid case, the Court was examining whether it would be permissible for interfering with an award which was a non-speaking one merely because the arbitrator had awarded the claim at an escalated rate for the excess quantity of work and since the award itself was a non-speaking award, the Court held that it is not permissible to probe into the mental process of the arbitrator and then interfere with the same. Then again the question of granting a ; higher rate for any extra quantity of work executed by the contractor would at all arise only when the contract provides for such escalated rate either expressly or by implication as in the case of S. Harcharan Singh where the competent authority had agreed for the same by correspondence. But in the case in hand, when there is no such acceptance by the competent authority, and there is no provision in the contract, permitting such escalated rate for the additional quantity of excavation made and in view of our rejecting the contention raised on the basis of clause 63, the conclusion is irresistible that the contractor will not be entitled to a higher rate for the additional excavation work and as such the High Court was fully justified in setting aside the direction of the trial Judge, remitting Claim Item 1 for reconsideration and we see no infirmity with the said direction of the High Court to be interfered with. We also find ; sufficient; force in the submission of Ms Amareswari, relying upon the letters of the competent authority, specifically intimating that the grant of extension of time will not in any way make the contractor eligible for any extra claim due to escalation in rates of labour and materials or due to any other reasons under any circumstances and the decision of this Court in Ramalinga Reddy supports the aforesaid contention. In the aforesaid premises, we do not find any merit in this appeal, requiring our interference with the impugned judgment of the High Court. The appeal fails and is dismissed but in the circumstances there will be no order as to costs.

Apex Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, has held that only those claims can be entertained which are covered by agreement.

We find in instant case that there is no provision in the agreement expressly providing for escalation. There is no clause in the agreement or Manual that terms and conditions which are not mentioned in the agreement are to be borrowed from the M.P. Works Department Manual. Hence, even by implication, we cannot read M.P. Works Department Manual clause 2.40.1 of Appendix 2.10-A forming part of agreement entered between the parties. There are number of general provision in the M.P. Works Department Manual which permit the department to act within the para-meter contained in various Appendix. Once agreement has been entered into without provision for escalation it is clear that it is not to be given/claimed. It is not necessary to provide for escalation in agreement in every case in case it is permissible under the PWD Manual which is

only enabling provision to enter in to such an agreement. Once agreement is entered into it is conclusive and binding.

In the absence of stipulation as to escalation in the agreement entered into between the parties it can not be culled out that either expressly or implication, escalation formed part of agreement. Hence, we find that there is no error of law committed by the Arbitration Tribunal while rejecting the claim of escalation made by the petitioner.

Resultantly, we find no merit in this revision. Same is hereby dismissed. Parties to bear their own costs as incurred in this revision.

In view of the aforesaid discussion, we find that challenge to the award as to the escalated costs cannot be allowed to sustain. Thus, the award is set aside with respect to payment of escalated costs. Parties to bear their own costs as incurred.