
(2015) 08 MP CK 0093
In the Madhya Pradesh High Court
Case No : Arbitration Appeal No. 42 of 2014

State of M.P.	Vs	APPELLANT
Tirupati Buildcon (P) Ltd.		RESPONDENT

Date of Decision : 04-08-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 37

Citation : AIR 2015 MP 183 : (2015) 6 ARBLR 404

Hon'ble Judges : Rajendra Menon, J; S.K. Gupta, J

Bench : Division Bench

Advocate : Sanjay Dwivedi, Learned Deputy Advocate General, for the Appellant; V.R. Rao, Learned Sr. Advocate and N. Jauhari, Advocates for the Respondent

Final Decision : Dismissed

Judgement

1. As common questions of law and facts are involved in all these appeals filed by the State Government under Section 37 of the Arbitration and Conciliation Act, 1996, they are being disposed off by this common order. Respondent M/s. Tirupati Buildcon Pvt. Ltd., was granted a contract for the purpose of widening of two lane roads strengthening over various portions of National Highway No. 78 on the basis of an agreement entered into between the parties. The agreement in question contemplated a provision for its completion within 12/14 months and it is an admitted position that in Arbitration Appeal Nos. 42/2014 and 43/2014, the work was not completed within the stipulated period and therefore, after due approval from the competent authority, extension of time was granted. In Arbitration Appeal No. 44/2014 also, the work could not be completed within 12 months. It was completed within a period of 17 months and 27 days and in this case also, approval was granted. For the work done during the extended period, the contractor claimed escalation in the cost price for execution of the work and when the same was rejected by the Departmentally Adjudicating Authority in accordance with the arbitration clause, the matter was referred for arbitration to

the sole arbitrator namely one Shri A.L. Kori, a retired Chief Engineer, Public Works Department, M.P. The arbitrator having awarded the escalation cost beyond the period of 12 months in each of the case in question, these appeals have been filed by the State Government and the only question raised in these appeals is that once Clause 13.4 of the agreement which contemplated the provision for grant of escalation cost, in case, the contract is not concluded within the period of 12 months was deleted from the original contract, the arbitrator and the trial Court could not have awarded escalation cost.

2. Shri Sanjay Dwivedi invited our attention to the agreement in each of the case, Clause 13.4, thereof and argued that clause 13.4 in two parts reads as under:

13.4 The rates and prices quoted by the bidder shall be fixed for the duration of the Contract and shall not be subject to adjustment on any account (For contract up to 12 months period)

OR

13.4 The rates and prices quoted by the bidder are subject to adjustment during the performance of the contract in accordance with the provisions of Clause 47 of the Conditions of Contract (For contracts more than 12 months period).

He submits that the second portion of Clause 13.4 which contemplates a provision for escalation in accordance with the formula contemplated in Clause 47 was deleted in the contract in question and after deletion of the same, the Executive Engineer issued a corrigendum vide Annexure A/2 and indicated that this is an error and therefore, it was said to have been incorporated by this corrigendum. Shri Sanjay Dwivedi argued that once the agreement was executed by deleting the second part of Clause 13.4 unilaterally by a corrigendum the Executive Engineer could not incorporate such a provision into the contract and therefore, an error has occurred in reading this part of the contract both by the arbitrator and by the trial Court, therefore these appeals should be allowed. Shri Sanjay Dwivedi further refers to Clause 47 of the Conditions of the Contract and submitted that this Clause contemplates a provision i.e. formula for calculating the escalation clause. Once the provision of escalation as has been incorporated in Clause 13.4 was not part of the agreement as it was deleted. It is said that an error has occurred in granting the benefit to the respondent contractor.

3. Shri V.R. Rao, learned counsel for the respondent refuted the aforesaid contentions and argued that even if the contention of Shri Sanjay Dwivedi is accepted, the first part of Clause 13.4 contemplates that the rates and prices quoted by the bidder shall be the fixed price for duration of the Contract i.e. for the period of 12 months. According to Shri Rao, this is a clause which contemplates the fixed rate if the contract is completed within 12 months and there is no prohibition for grant of escalation cost, if the contract is extended beyond this period, as the contract is silent on this condition, it is argued by him that the arbitrator and the trial Court have not committed any error in permitting

escalation as per formula contemplated under Clause 47 of the Conditions of Contract as the contractor was entitled for the same. That apart, Shri V.R. Rao argued that the Executive Engineer is the person who executed the contract, signed it on behalf of the State Government and when he found that there is an error in the signature and execution of the contract, he was duly authorised to issue the corrigendum and once the corrigendum is issued and the respondent contractor accepted the same, the corrigendum also becomes part of the agreement due to acceptance of the same by the respondent and therefore, in allowing the escalation as per the corrigendum as alternate perception, no error has been committed by the arbitrator or the trial Court. That apart, inviting our attention to a judgment of the Supreme Court in the case of *The State of Madhya Pradesh and Others Vs. Babulal Pathak*, AIR 1974 MP 179 : (1974) 19 MPLJ 191 : (1974) 19 MPLJ 191, Shri V.R. Rao, learned senior counsel argued that when the award is challenged and when the Court exercises power under Section 34 of the Arbitration and Conciliation Act, even if there is an error of law committed by the arbitrator, the same cannot be corrected in a proceeding under section 34 of the Arbitration and Conciliation Act and therefore, if the aforesaid principle is applied, these appeals are liable to be dismissed.

4. We have considered the rival contentions of the parties and we find that similar arguments were advanced before the arbitrator and the arbitrator found that escalation cost can be granted because the arbitration agreement itself contained a provision for grant of escalation cost if the work is not completed within the stipulated period i.e. 12 months. The learned arbitrator found that in this case the Executive Engineer was the person who executed the agreement and if he issued a corrigendum, there is no error in the same. The learned arbitrator has read together the provisions of Clause 13.4 and clause 47 to hold that even after deleting the clause 13.4, clause 47 has not been deleted and taking into consideration the totality of the circumstances has awarded the amount. In Para 11, the arbitrator has dealt with the matter in the following way:

"11. I considered statements of both the parties on this claim, documents and clauses of agreement. It is correct that lower part of clause 13.4 was deleted and it is also an admitted fact that corrigendum was issued. Therefore, the question for consideration is whether in these circumstances, escalation is payable or not. By reading Clause 13.4 of tender document, it is evident that this clause does not allow payment of escalation where intended completion period is upto 12 months. Since the corrigendum was issued by the Employer under the agreement, same is binding on parties. In this corrigendum the Employer has given the corrected clause 13.4 and deleted lower part of clause 13.4 became irrelevant. Even otherwise, since the contract period was 14 months, it is clear that deletion of lower part of agreement was wrong and the Executive Engineer acting as "Employer" has lightly issued corrigendum. The respondent could not explain as to why clause 47 of Conditions of Contract relating to Price Adjustment and formulae given in Contract Data for calculation of escalation were retained and not deleted in the agreement. Escalation is payable as per Price Adjustment

clause No. 47 of Condition of Contract and formulae given in Contract Data of the agreement. Claimant's argument that with issuance of corrigendum corrected clause 13.4 as given in Annexure 2 should be read and deletion of clause 13.4 does not amount to prohibition of payment of escalation is accepted. There is no dispute over quantum of this claim, therefore, I allow this claim of price adjustment/escalation amounting to Rs. 55,76,063/- in favour of the Claimant."

Thereafter, when the objections were raised before the trial Court, the trial Court has also dwelt with this aspect of the matter and has found that in the light of the finding recorded in Para 11, no error has been committed by the arbitrator and by applying the principles of law in the case of *The State of Madhya Pradesh and Others Vs. Babulal Pathak*, AIR 1974 MP 179 : (1974) J LJ 293 : (1974) 19 MPLJ 191 : (1974) MPLJ 191 , has rejected the objections of the State Government. In our considered view, both the arbitrator and the trial Court have not committed any error in dealing with the matter. It is an admitted position that the work in question was extended beyond the period of completion i.e. 12/14 months and that being so, even if the first part of Clause 13.4 is read in totality, it only contemplates for granting the fixed price during the original period of the contract. There is nothing in this clause which prevents the authorities from granting escalation if the contract is extended beyond the period stipulated therein. That apart, we may also consider the fact from a different angle i.e. the contract on behalf of the State Government was executed by the Executive Engineer and he was the signatory to the contract. He having found that there is some error issued a corrigendum. The respondent-contractor having accepted the same and proceeded to complete the work based on such an understanding, the corrigendum also becomes part of the contract, it becomes a concluded agreement between the parties and taking note of the circumstances, the award has been passed granting escalation. We find no reasons to interfere into the matter in a proceeding under section 37 of the Arbitration and Conciliation Act. Accordingly, finding that no case made out for interference, all the appeals are dismissed.