

(2011) 12 CAL CK 0069
In the Calcutta High Court
Case No : AP No. 103 of 2006

State of West Bengal

APPELLANT

Vs

K. Banerjee and Bros

RESPONDENT

Date of Decision : 07-12-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Constitution of India, 1950 — Article 299
Evidence Act, 1872 — Section 115, 34

Citation : (2012) 3 CHN 417

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Samrat Sen, P. Sinha, Bhargav Mitra, Amitava Ghosh, Navojit Mukherjee and Jeenia Rudra, for the Appellant;

Judgement

Sanjib Banerjee, J.—The challenge to an arbitral award is on a short question. The State, with a petition littered with its trade mark errors, charges that the respondent contractor was not entitled to any money in excess of an increase of 15 per cent over the contract value, and since the contractor had unequivocally undertaken not to charge any amount over such additional figure of 15 per cent, the award is without basis. The State says that upon the arbitrator holding that the undertaking furnished by way of a letter dated April 17, 1998, did not amount to novation of the contract between the parties, he disregarded the effect of the undertaking. This, the State, asserts resulted in a grievous error of the kind that section 34 of the Arbitration and Conciliation Act, 1996 permits to be corrected. The contract was for the construction of one or more buildings by the contractor somewhere in Haldia. The State says that the contract was pursuant to a World Bank funded project undertaken by the State. The terms of the contract and its interpretation are not in dispute. Clause 38.2 of the contract provided that upto 15 per cent of the contract value could be allowed as permissible escalation by the concerned engineer; for any claim in excess of such amount the approval of the employer (the petitioner herein) had to be obtained.

2. By a letter dated September 23, 1997 the petitioner wrote to the contractor saying that if the contractor was not confident that the entire cost of the project could be restricted to within the contract value and the additional 15 per cent, the contractor should discontinue some parts of the work undertaken by it. The letter referred to the casting of the roof relating to the lift being abandoned and the further construction of the buildings at the rear portion not being continued above the first floor level. In January, 1998 the contractor wrote back saying that the contractor was confident that the additional expenses, over and above the contract price that would be incurred, would be less than the 15 per cent cap thereon. There are two further letters that are of relevance in the context, including the one written by the contractor on April 17, 1998. By such letter, the contractor said that the proposed total expenditure would be to the tune of Rs. 3,20,55,233/-. That implied that the total value of the work done would be within 115 per cent of the contract value since the contract price was Rs. 2,79,87,225/- and the 15 per cent permissible additional amount worked out to Rs. 41,98,083/-. The second paragraph of the letter is of significance:

In this connection may we mention that due to non-availability of correct "Data" the exact amount of price adjustment on escalation could not be assessed as yet. However, we do hope that the total expenditure including the extra items and adjustments due to escalation will not exceed beyond (sic, beyond) 15% (fifteen percent) of the Bid price, we do however undertake that in the event of the total expenditure increases beyond 15 % of the Bid price (fifteen per cent only) we shall have no claim on the same.

3. The contractor signed off by hoping that such assurance or undertaking would meet with the petitioner's requirement and the virtual closure order issued by the petitioner would be lifted.

4. It appears that the time available under the contract for completion of the work was to run out some time in July, 1998. Following a request from the contractor, the petitioner issued a letter on August 19, 1998 extending the tenure till October 6, 1998 on condition that such extension had to be read "in conjunction with the declaration given by you under your letter... dated 17.4.98 and by no means construe (sic, confers) any right on your part to deviate from your contractual obligations."

5. It is not in dispute that the work was completed by November 20, 1998. By a letter dated January 25, 1999, the contractor claimed that notwithstanding the contractor's understanding that the additional expense could be kept within the ceiling of 15% above the contract value, certain circumstances had not been taken into account by the contractor at the time of its issuance of the letter dated April 17, 1998. In short, the contractor sought to resile from the stand taken by the contractor in the letter of April 17, 1998 and suggested that because of myriad reasons, including the volatility of the Reserve Bank of India index on divers counts, the contractor was entitled to an amount in excess of the 15% cap. The letter was addressed to the Superintending Engineer who had

entered into the contract on behalf of the State with the contractor since it was the contractor's understanding that for any amount in excess of 15% over and above the contract value to be accepted, it required the authority of the officer superior to the engineer involved in the project. The contractor's letter of January 25, 1999 specifically required the contractor to be absolved of the consequences of the contractor's written representation of April 17, 1998.

6. The dispute resolution mechanism envisaged by the contract required the contractor to carry any grievance to an adjudicator. Either party to the contract, if aggrieved by the adjudicator's decision, could initiate an arbitral reference. The adjudicator held against the State and awarded an amount of about Rs. 11.74 lakh in favour of the contractor. Such amount of Rs. 11.74 lakh was over and above the contract value and the additional 15% that was permissible to be expended thereunder. The adjudicator reasoned that it was illegal on the part of the State to withhold such payment though the State had been allowed to recalculate the claim on account of escalation that had been tendered by the contractor. The contractor had sought an amount of about Rs. 33 lakh on such score which the State had scaled down to about Rs. 28 lakh.

7. The arbitrator noticed an argument made on behalf of one of the parties and it is not relevant which that the entire contract had apparently been substituted by the agreement contained in the letter of April 17, 1998 and the State's acceptance thereof. The principle of novation was needlessly bandied in the reference and the arbitrator held that there could not have been any new contract that the parties had executed since a contract on behalf of the State, under Article 299 of the Constitution of India, required to be executed by or on behalf of the Governor. It is on such ground and such ground alone that the arbitrator discarded the State's contention that upon the contractor issuing the letter of April 17, 1998 and binding itself to accept only an additional amount of 15% over the contract value, the contractor was not entitled to anything more.

8. The arbitrator did not interfere with the adjudicator's decision and allowed the assessment to remain. The only additional feature in the award is in the arbitrator having permitted interest for a particular period that was within the domain of the arbitrator.

9. The State argues that the contractor was clearly estopped by its conduct from claiming anything more than 115% of the contract value. The State refers to page 189 of the petition which is a page from the adjudicator's decision that records that the State had accepted the full complement of Rs. 3,21,85,309/- as being payable to the contractor and had disowned the balance claim, whether or not it was otherwise justified. The State says that the applicability of clause 38.2 of the contract did not arise since the contractor had given up any right to make a claim in excess of 115% of the contract value.

10. The State has referred to judgments reported at (2003) 3 SCC 255 and AIR 1947 PC 40 for the proposition that estoppel, in addition to being a cardinal

principle of evidence as recognized in section 115 of the relevant statute, is also a substantive rule of law. This, the State emphasises on so as to bring its challenge in the present proceedings within the parameters of section 34 of the 1996 Act as mandated in the judgment reported at Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . The State says that the principle of novation is quite distinct from what the parties had or could have urged before the arbitrator and it could have been nobody's case that the entirety of the contract had been wished away upon the letter of April 17, 1998 having been issued or the contents thereof having been accepted by the State.

11. The contractor refers to the well accepted principle that the Court does not sit in appeal over an award and the extent of the Court's investigation into matters such as these would be restricted. The contractor has relied on the judgments reported at Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, to suggest that if the arbitrator takes a plausible view, merely because another view appears to be more attractive to the Court, should not result in the Court interfering with the award. The contractor suggests that since there is no challenge as to the jurisdiction of the arbitrator in making the assessment which has been done and it is obvious that it was within the arbitrator's domain to decide the questions before him, the Court should not supplement its view for the arbitrator's.

12. The contractor seeks to justify the grounds made out in the letter of January 25, 1999, issued by it. The contractor says that the rates indicated in the letter of January 20, 1998 were tentative and the letter recorded as such. The contractor claims that the contractor could not have been tied down to the figure of about Rs. 23 lakh that is indicated in the letter of January 20, 1998. The contractor refers to the wholesome reasons given in support of its claim in the letter of January 25, 1999.

13. There is one particular paragraph that the contractor singles out from its letter of January 25, 1999. The contractor had claimed therein that the buildings had been completed in all respect and it was upon a minister visiting the premises that the contractor was required to change the colour of the main building. The relevant paragraph claimed that the contractor had incurred an additional expenditure of about Rs. 5 lakh on such score.

14. The arbitrator negated the State's contention that the contractor was not entitled to any further sum in excess of 115% of the contract value on the ground that there could have been no novation of the original contract following the issuance of the letter dated April 17, 1998. Clearly, this was an error of law and a complete misreading of the letter issued by the contractor and its effect.

15. In the relevant paragraph of the letter dated April 17, 1998, there was a hope expressed in the first sentence but the commitment in the second sentence was absolute and without reservation. Further, it was based on the State's understanding of the unreserved commitment of the contractor that the State

agreed to the extension of the period of work and the State specified as such in the penultimate paragraph of the letter dated August 19, 1998. The contractor did not respond immediately to the State's letter of August 19, 1998. Appearance The contractor took the benefit of the extension granted by the State, waited till the work was completed and was accepted by the State and only a couple of months thereafter did it dawn on the contractor that it had made a mistake in committing to restrict its bill for the additional work and escalation to 15% above the contract value.

16. Such conduct clearly answers to the definition as contained in section 115 of the Evidence Act. Following the State's specific direction that the contractor should not continue any work unless the contractor was satisfied that the total expenses could be kept within 115 per cent of the contract value, the contractor gave its tentative estimate. The tentative estimate was about Rs. 17 lakh short of the permissible limit. The contractor cannot be tied down to the tentative estimate that the contractor gave, but the contractor can surely be tied down to the firm commitment given that the contractor would not charge for any additional work or any escalation beyond the additional 15 per cent as envisaged in the contract. Even in issuing the relevant letter dated April 17, 1998 the contractor kept unto itself the latitude of Rs. 17 lakh which could be met within the cap of 15 per cent of the contract value.

17. With respect, the arbitrator did not take a view which was plausible on the facts and the law governing the facts. There was a clear error committed by the arbitrator in reading the letter and making an assessment thereon on the basis of the applicable law. Rules as to public policy would require such an error to be corrected u/s 34 of the 1996 Act.

18. It thus comes to transpire that the contractor would not be entitled to the additional amount of Rs. 11.74 lakh by which the cap of about Rs. 3.21 crore was exceeded in course of the contractor's additional claim pursuant to the letter of January 25, 1999. Yet, it is unmistakable that the contractor claimed that after the entire work was completed, the contractor had to undertake an additional work by redoing the paint for which a sum of Rs. 5 lakh was expended. It is evident that even from the letter of January 25, 1999 that such work was not required to be undertaken for the purpose of the work but had to be carried out because the coat of paint did not meet the minister's approval.

19. At page 189 of the petition it is evident that the entirety of the amount claimed by the contractor on account of escalation and additional work had been considered by State and the State merely reworked the calculations to reduce the figure from about Rs. 33 lakh to Rs. 28 lakh.

20. It is thus apparent that notwithstanding the contractor's commitment to restrict its claim on account of additional work or escalation to 15 per cent of the contract value, there was some work that the contractor had to undertake at the behest of the State or its officers which was, probably, not contemplated by

either party at the relevant time. It is in such circumstances that the contractor will be entitled to the additional amount of Rs. 5 lakh claimed in the letter of January 25, 1999 notwithstanding such amount exceeding 115 per cent of the value of the contract. Such work was done not because it was required to be done but because it was suggested on behalf of the State or one of its officers.

21. Ideally, the matter should be remanded for reconsideration of the contractor's claim for the additional work of re-painting. However, the arbitrator is not available. The matter has dragged on for a considerable period. To now direct a fresh reference to be undertaken would result in resources being expended. It is in such circumstances that the ballpark figure of Rs. 5 lakh for the additional work of re-painting is accepted.

22. The marginal delay in filing the petition, beyond the period of three months but within the extended period of 30 days as envisaged by section 34 of the 1996 Act, is condoned. It is also recorded that though some murmurs with regard to the lack of this Court's jurisdiction to entertain the matter was made by the respondent, such ground has not been clearly canvassed.

23. Accordingly, the award is modified by reducing the principal sum of Rs. 11,74,704/- to Rs. 5 lakh and leaving the rest of the award untouched including the interest as awarded by the arbitrator. The interest will, naturally operate on this principal sum of Rs. 5 lakh.

24. AP No. 103 of 2006 is disposed of as above without any order as to costs. Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.