
(1992) 07 DEL CK 0011
In the Delhi High Court
Case No : Suit No. 22A of 1990

Surinder Kumar

APPELLANT

Vs

New Delhi Municipal Committee

RESPONDENT

Date of Decision : 22-07-1992

Acts Referred:

Arbitration Act, 1940 — Section 14

Citation : (1992) 23 DRJ 424

Hon'ble Judges : Sagar Chand Jain, J

Bench : Single Bench

Advocate : D.P. Sharma and H.P. Sharma, for the Appellant;

Judgement

S.C. Jain, J.

(1) The work regarding construction of community NN centre at Malcha Marg. New Delhi was entrusted by the Executive Engineer (H) Ndmc on behalf of New Delhi Municipal Committee vide his letter dated 7.11.1986 and Agreement No., EE(H)/14/1986/87 was entered into between the parties in this regard. Certain disputes arose in respect of the contracted work and the claimant Surender Kumar vide letter dated 2.1.89 invoked the provisions of clause 25 of the agreement and requested the Administrator New. Delhi Municipal Committee to appoint an arbitrator to settle the disputes. The Administrator New Delhi Municipal Committee vide his letter No. EE(C-III)/AB/116-18 dated 19.1.89 appointed Shri R.S. Gupta, former Engineer Member Dda and retired Chief Engineer Cpwd to decide the disputes and to make a reasoned award regarding the claims as per the statement enclosed with 19.1.89.

(2) The Arbitrator entered upon the reference on 23.1.1989. The petitioner submitted 16 claims in the form of Memo of Claims before the Arbitrator which are as under :

1.Claim No.1 for Rs. 1,22,361/ on account of non payment of final bill. 2. Claim No. 2 for Rs. 73072.00 for extra items executed but not paid. 3. Claim No. 3 for

Rs. 14099.00 on account of wrong mode of measurement of steel. 4. Claim No. 4 for Rs. 5223.00 on account of non payment of correct percentage in respect of extra substituted items. 5. Claim No. 5 for Rs 37213.00 on account of declaratory award on account of refund of security deposit. 6. Claim No. 6 for Rs. 181117.00 on account of non payment of enhanced rate for work done beyond the stipulated period. 7. Claim No. 7 for Rs. 58.364.00 on account of non payment of enhanced rate for work done beyond the deviation limit of contract as per clause 12(a). 8. Claim No. 8 for Rs. 31948.00 on account of non payment of hire charges for centering and shuttering rendered idle due to non availability of drawings. 9. Claim No. 9 for Rs. 29260.00 for idle T&P due to prolongation of the contract. 10. Claim No. 10 for Rs. 5870.00 for idling of scaffolding due to delay in design and decisions for outer finishing .11. Claim No. 11 for Rs. 8102.00 on account of staff expenses during prolonged period. 12. Claim No. 12 for Rs. 75741.00 on account of losses suffered by the claimant. 13. Claim No. 13 for Rs. 6000.00 per month on account of declaratory award for loss of business. 14. Claim No. 14 for compound interest at the rate of 20% p.a. pendente lite and future interest. 15. Claim No. 15 for Rs. 1,12,304.00 on account of wrong fixation of rates for extra items. 16. Claim No. 16 for Rs. 10,000.00 towards cost of arbitration proceedings.

(3) After hearing the counsel for the parties and going through the documents and evidence on record, the Arbitrator made and published his reasoned award on 13.12.1989. Claim No.1 is for Rs 1,22,361.00 on account of non payment of the Final bill. This claim has been divided into several sub heads. Sub head I is on account of deduction in the agreement rates for quantities executed beyond the deviation limit to the extent of Rs. 12174.99. The Arbitrator awarded Rs. 11795/- as claimed in the sub head. Sub head 2 is with respect of short payments on account of extra and substituted items to the extent of Rs. 1268.60. Against this item the arbitrator has awarded Rs 1226.00 .

(4) Sub head 3 is with respect to difference or so called short payment in respect of clause 10C to the extent of Rs. 34072.24. Against this item only Rs. 8886.00 was awarded. Sub head 4 is in respect of double rate recovery of cement to the extent of Rs 5967.00 . This entire amount has been awarded. Sub head 5 is with respect to the amount- of deduction due to defects amounting to Rs. 5405.77 which has been awarded by the arbitrator in toto. In computing the amount awarded by the Arbitrator in claim No. I Therefore comes to Rs. 33279 in settlement of this claim.

CLAIMNO. 2 is to the extent of Rs. 73072.00 for extra item executed but not paid. This claim was divided among many sub heads and the total amount awarded against this claim by the Arbitrator is Rs. 66724.00 . Claim NO. 3 is with respect to wrong mode of measurement of steel which is to the extent of Rs. 14099.00 . The Arbitrator allowed the claim in toto. Claim NO. 4 is with respect to non payment of correct percentage in respect of extra substituted items and is for Rs. 5223.00 . This claim was disallowed by the Arbitrator as the claimant

failed to substantiate this claim. Claim NO. 5 is for Rs 37213.00 on account of declaratory award on account of refund of security deposit. The security deposit has been refunded to the petitioner, so the Arbitrator did not award anything against this claim. Claim NO.6 is on account of non payment of enhanced rate for work done beyond the stipulated period to the extent of Rs. 1,81,117.00 . The Arbitrator awarded Rs.1,40,682.00 in settlement of this claim. Claim NO. 7 is on account of non payment of enhanced rate for work done beyond the deviation limit of contract as per clause 12(a) to the extent of Rs. 58364/-. Against this claim the Arbitrator found that the claim did not fulfill the provisions of Clause 12(a). He did not award anything against this claim. Claim NO. 8 is for Rs 31948.00 on account of non payment of hire charges for centering and shuttering rendered idle due to non availability of drawings. Against this item the Arbitrator awarded Rs 18592.00 in settlement of this claim. Claim No. 9 is for Rs. 29260.00 for idle T&P due to prolongation of the contract. The Arbitrator has awarded Rs 17500.00 in settlement of this claim. Claim NO. 10 is for Rs. 5870.00 for idling of scaffolding due to delay in design and decisions for outer finishing .This claim was rejected by the Arbitrator as the claimant failed to substantiate the claim with any documentary evidence. 428 Claim No. 11 is for Rs.58102.00 on account of staff expenses during prolonged period. The Arbitrator has awarded Rs. 34750.00 in settlement of this claim. Claim NO. 12 is for Rs. 75741.00 for the losses suffered by the claimant. The Arbitrator awarded Rs. 36242.00 in settlement of this claim. Claim No. 13 is for Rs. 6000.00 per month on account of declaratory award for loss of business. This claim was rejected by the Arbitrator on the ground that the damages claimed by the claimant were remote which were not admissible u/s 73 of the Contract Act. Claim No. 14 is for compound interest at the rate of 20% p.a. pendente lite and future interest. Against this item the Arbitrator awarded future interest at the rate of 15% p.a. on the awarded amount of various claims w.e.f 13.12.89 till the date of payment or decree whichever is earlier.

(5) Regarding claim No. 15 which is for wrong fixation of rates for extra items the Arbitrator has awarded Rs. 1,10,341.00 as against the claim of Rs 1,12,304/- Claim No.16 is for Rs 10,000.00 towards cost of arbitration proceedings which was disallowed by the arbitrator and the parties were held to bear their own costs. The respondent did not prefer any counter claim.

(6) An application u/s 14 of the Arbitration Act was filed by the petitioner for filing the original award and the arbitration proceedings for making it a rule of the court. The Arbitrator filed the award and the arbitration proceedings in the court. Notice of the filing of the award was issued to the parties inviting objections within the statutory period. The petitioner did not file any objection to the award. However, the respondent Ndmc filed objections (I.A. 6646/90) on 22.5.90. The main objection taken by the respondent is that the award is against the documents i.e. the contract executed between the parties. In paras 10-12 comments the finding of the Arbitrator in claim No. 1 was disputed on the plea that the the Arbitrator has adopted dual method of giving benefit to the

petitioner regarding escalation of labour charges. Penal rate of recovery of cement was effected correctly as per clause 42 of the Conditions of Contract.

(7) Regarding claim No. 2, it is submitted that the work done as extra items are covered in the main item as well as applicable specifications. The Arbitrator did not verify about the work of wax polishing. Regarding the claim No. 3 the respondent relied upon their counter statement of facts. The samples were selected by the claimants themselves. The Arbitrator did not appreciate the statement of the respondent while awarding Rs. 14099.00 in favor of the petitioner. Regarding claim No. 6 under clause 13 no compensation is payable. The work was delayed on account of the petitioner himself.

(8) Regarding claim No.8 it is submitted that it was duplicate claim particularly when the petitioner was paid the general hike in claim No.6 and loss of profitability in claim No. 12. Award against claim No.8 has also been challenged on the ground that claim of damage cannot be allowed unless liquidated damages are proved by the effected party .

(9) Regarding Claim No. 11 it is stated that the Arbitrator did not consider the defense arguments while awarding Rs 34750/ in favor of the petitioner. The amount awarded against claim No.12. 14, 15 was also challenged on the plea that the Arbitrator did not consider the arguments while awarding the amount in favor of the petitioner. The petitioner filed reply to these objections. On the pleadings of the parties the following issues were framed : 1. Whether the award is liable to be set aside on the objections of Ndmc ? 2. Relief. I have heard the counsel for the parties and gone through the record. My findings are as under : Issue NO. 1 It has been held by the Division Bench of our own High Court in Dda vs Alka Ram Air 1982 Delhi 65 that it is settled principle of law that the Arbitrator is the final Judge of facts and the court is bound by the Arbitrator's finding of fact and cannot review them unless they are unsupported by evidence and unless it appears from the award itself that there was no evidence to support the finding. It is not open to the court to examine the adequacy of evidence which led the arbitrator to his findings of fact. His findings are final. u/s 30 an award can be set aside only on the grounds contained therein. These pertain to improper procurement or invalidity of the award and misconduct of the proceedings or the arbitrator. The decision of the arbitrator who is the chosen judge of the parties, is normally final both on facts and law and should not be lightly set aside. But an arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he considers just and reasonable. He is selected by the parties to decide their disputes according to law and is bound to follow and apply it. If he does not, he will be set right by the Court provided the error appears on the face of the award. As such, facts must be based either on evidence or on admission, they cannot be found to exist from a mere contention by one side especially when they are expressly denied by the other.

(10) Applying the said principles of law it has to be seen whether the the Arbitrator has misconducted himself or the proceedings and his findings are

without any evidence or against law. Regarding claim No. 1 it is not disputed that the petitioner was submitting for nightly labour reports indicating labour rates and the petitioner was required to make payment of minimum wages as per requirement of the Government. At no stage any complaint was made by NDMC. Regarding the penal rate recovery of cement amounting to Rs 5967.00 the Arbitrator has rightly held that in the absence of loss having been suffered or proof of actual loss if suffered, respondent No. 1 was not entitled having already recovered the issue rate, to recover double the issue rate of cement consumed by the claimants in excess of the theoretical calculations. This is the law as laid down by this court in Salwan Construction Co. Vs. Union of India and Others, Objection regarding the refund of Rs. 5405.00 on account of defects is not tenable. This is a finding of fact and cannot be challenged and is not assailable before this Court. It is nowhere on the record that deductions were made after issuing notice to the petitioner for rectification of the alleged defects. There is no illegality or irregularity in the finding of the Arbitrator while awarding the amount of Rs. 33279.00 against claim No.1.

(11) Regarding claim No.2 the objection of the respondent that the work done in extra item was covered in the main item as well as applicable specifications. There is nothing on record to substantiate this objection of respondent No.1. The objection that the work of non execution of wax polishing was not verified is also not tenable .The respondent has admitted in the reply to the claim that the petitioner had only applied exholic acid which is included in the item of wax polishing. Exholic acid is used for washing the floor and wax polish is done after that which is not included in the scope of the item. It has been held by this court in Delhi Development Authority Vs. Bhagat Construction Co. (P.) Ltd. and Another, that granolithic consists of cement and granite chips. It is not essential that the word wax polishing should be mentioned in the contract. It is not an extra item which could be awarded, under the item of the contract. The Arbitrator awarded the amount after considering the provisions of the contract and entire facts placed before him and it cannot be challenged before this court being a matter of fact. The other objection of the respondent with regard to award of Rs. 52350/ to the petitioner is also not tenable on the basis of facts available on record. As per the objection raised by the respondent in reply to the statement of claims the element of cutting the stone in appropriate size was included in the agreement item itself and no extra payment for laying the flooring in the pattern should be allowed. Ex C22 makes it clear that extra charge would be charged @ 1.25 per sq mts over and above the quoted rate in pattern. This finding is on the basis Of facts available on record and is not challengeable before this court.

(12) Regarding claim No.3 the objection of the respondent is against the facts available on record. There is nothing on record to show that rods were got weighed in some other lab and not in the Ndmc lab. The allegation of theft and pilferage were taken for the first time in the counter statement of facts without any evidence on record. At no point of time the respondent alleged about theft

and pilferage during the work or thereafter .Neither there is any misconduct on the part of the Arbitrator nor there is any error on the face of the award as far as this item is concerned. Regarding the objection against award in claim No. 6 it is nowhere 31 on record that the work was delayed by the petitioner. The Arbitrator took into consideration the issue rate of steel and cement. The claim relates to the increased cost of construction. The Arbitrator has relied upon document Ex. C- 51 which is cost indices of Cpwd which shows that at the relevant time the increase was 33.80%. The Arbitrator only awarded 20% increase. Moreover these findings are based on facts and there is no error apparent on the face of the record.

(13) The counsel for the respondent strongly opposed the claim awarded against item No.8,9, 11 and 12. According to the learned counsel, these claims are based purely on hypothetical basis. No documentary evidence of actual payment of hire charges and damages suffered was produced by the claimant. Moreover, the arbitrator has awarded a sum of Rs. 1.40.682.00 on account of non payment of enhanced rate of work done beyond the stipulated period. The claims against these items are included in claim No.6. After 15.11.1987 the concrete mixer and vibrator were not required at the site as structural items requiring use of these machines was completed before that date and that the claimant has not substantiated these claims by proof that the above machinery were lying at the site and were applied during the period claimed. The contract was prolonged on the part of the claimant. Clause 36 does not provide for employment of full time engineer. Since it is a claim of damages, the claimant was bound to produce their books of account in order to assess the actual damages suffered by the claimant regarding idleness of staff at the site. Counsel further submitted that no contractor can accept the rate and margin of profit and Therefore ten per cent profit is on hypothetical basis. The Arbitrator did not consider the profit for extra work got done which was not covered within the main contract. The Arbitrator had gone beyond his power and failed to apply his wisdom in awarding the claim. As he has misconducted himself and the proceedings and there is mistake apparent on the face of the award, the award is liable to be set aside as far as these claims contained in these items is concerned.

(14) Regarding the claim of future interest under claim No. 14, the counsel submitted that respondent had already deposited a sum of Rs. 4,91,827.65 by moving an application which amount is lying deposited in this court and as such the liability of the respondent to pay interest on the amount awarded ceases. From the record it is apparent and it is also not disputed that the stipulated date of completion of work was 16.11.87 and it was actually completed on 27.7.88. There is also no dispute that some additional work was got executed from the contractor and he was to get extra payment for that extra work. Without going into the dispute, which is a matter of fact whether the delay in completing the work was on account of fault of the officials of the Ndmc or on the part of the contractor, the Arbitrator gave his finding on the basis of the fact that it was on account of the fault of the officials of Ndmc which resulted in delay in the

completion of work. The contractor has based most of his claims under these items on account of delayed completion of work. A perusal of the award shows that in claim No.6, the Arbitrator awarded Rs. 1,40,682.00 as an increase of 20% over and above the contract rate for the work executed in the extended period.

(15) Regarding claim No.8, which is with respect to hire charges for centering and shuttering rendered idle due to no availability of drawings, the Arbitrator taking into account the documents as well as the evidence in this regard awarded a sum of Rs. 18592.00 towards this claim. From the record it is apparent that centering and shuttering remained idle for the period from 3.3.87 to 13.3.87 and then from 17.4.87 to 16.6.87. For this period the claimant has quantified his claim for centering, and shuttering which remained idle on account of delay on the part of the officials of NDMC. Being a matter of fact, no interference is required by this court in the award regarding this claim. Similarly claim No.9 is based on the matter of fact. After relying upon the documentary evidence available on record, the Arbitrator has awarded Rs. 17500.00 on this account. Finding that tools and plant which was arranged by the claimant could not be gain fully employed for five months and on that account he has awarded this amount. It is a matter of fact and no interference is required in the findings of the Arbitrator. The amount awarded against claim No. 11 cannot be justified. The finding of the Arbitrator against this claim is not based on evidence available on record and and it is against the terms of the contract. Clause 36 stipulates that technical staff should be available at the site whenever required by the Executive Engineer to take instructions. This docs not employ the employment of engineer on full time basis for this particular work. Moreover, there is nothing on record to show that the Engineer was called at the site of the work. The Arbitrator has awarded Rs. 1,40,682.00 on account of increase of 20% in the work executed during the extended period, though cement and steel was provided by the respondent at their own cost. It is also not disputed that the contractor executed extra items for which he got extra payment and that work was done during the extended period. The amount awarded against this claim cannot be sustained as it is not based on any evidence available on record or any admission. Such type of claim cannot be allowed from a mere contention by one side especially when they are expressly denied by the other. The decision of the Arbitrator awarding amounts against these items is not based on any evidence or admitted facts. Awarding these amounts on mere contentions when they are expressly denied by the other party is not justified. I, Therefore, set aside the award of the arbitrator awarding Rs. 34750.00 against this item. Similarly claim No.12 is not sustainable on the face of it. The Arbitrator did not consider the profits from extra/additional work got done from the claimants which were not covered within the main contract. Moreover, the loss alleged to have been suffered ought to have been proved by cogent evidence. In contractor ship business no contractor can accept the rate and margin of profit and awarding the profit, at the rate of 10% by the Arbitrator is apparently on hypothetical basis. The objection raised by the respondent is tenable and the award of Rs. 36242/ on account of loss of profit is

set aside.

(16) Regarding, the claim of future interest as mentioned in item No. 14, the date of award is 30.12.89. It is not disputed that the respondent deposited Rs 4,91,827.65 in this court towards the amount of the award in account. After the deposit of the amount awarded, the liability of the respondent to pay interest ceases. The petitioner is entitled to interest from the date of award till the respondent deposited the amount in the court @ 12% p.a. simple interest. The award of the arbitrator in respect of the balance claims is made the rule of the court. Decree sheet be prepared accordingly. Parties are left to bear their own costs.