

(2009) 04 DEL CK 0423
In the Delhi High Court
Case No : O.M.P. No. 467 of 2005

Union of India

APPELLANT

Vs

M/s. Wishwa Mittar Bajaj and Sons and Another

RESPONDENT

Date of Decision : 28-04-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2009) 5 ILR Delhi 723

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Harish Malhotra with Ms. Namita Chaudhary, for the Respondent

Final Decision : Allowed

Judgement

Shiv Narayan Dhingra, J.—Union of India has filed objections u/s 34 of the Arbitration & Conciliation Act, 1996 to the award dated 31.7.2005 passed by respondent no.2/ the sole Arbitrator. Brief facts relevant for the purpose of deciding this petition are that the respondent no. 1 was awarded a lump sum contract for construction of infrastructure for breeding and training of dogs at RVC Centre and School at Meerut. The contract was for a sum of Rs. 2,79,44,098.10. The work was to be completed by 15.4.2003. The work was completed on 12.4.2003 and the respondent no. 1 submitted its final bill. After the payment against final bill was received, except a part of amount withheld by the petitioner, respondent no. 1 raised a dispute and the matter was referred to the Arbitrator/respondent no. 2. Before the Arbitrator, respondent made 10 claims. Claim no. 1 as compensation on account of delay in payment of running bills and final bill; claim no. 2 for reimbursement of additional expenditure incurred for providing extra work; claim no. 3 for reimbursement of payment made to labour sitting idle; claim no. 4 for reimbursement for charges paid for testing of steel; claim no. 5 for release of bank guarantee against retention money; claim no. 6 for refund of amount deducted on account of STE from final bill; claim no. 7 for reimbursement of expenditure incurred on renewal of bank

guarantee; claim no. 8 for refund of testing charges; claim no. 9 for reimbursement of extra expenditure incurred on watch and ward of the building due to delay in taking over possession and claim no. 10 was regarding interest. The learned Arbitrator disallowed claims no. 3, 6 & 8 and against other claims allowed different amounts. Regarding interest the learned Arbitrator allowed 12% interest for pre-arbitration period and 9% interest for pendent lite and future.

2. The award has been challenged by the petitioner on the ground that different amounts have been awarded by the learned Arbitrator beyond the contract and the claims raised by the claimant were neither tenable nor could be adjudicated in view of the specific terms of contract between the parties.

3. It is also submitted by the petitioner that the claims raised before the Arbitrator were not at all raised at any time during currency of contract or at the time of presentation of final bill. The respondent had given "no claim" certificate and accepted the final bill without reservation. After giving "no claim" certificate by the respondent the claims raised by the respondent could not have been considered by the Arbitrator and they were beyond the jurisdiction of the Arbitrator. The award passed by the learned Arbitrator was also perverse and in violation of conditions 64 & 66 of the contract.

4. After the contract was concluded while making final bill, the respondent no. 1 issued a certificate to the following effect: It is certified that I have prepared this final bill for claiming entire payment due to me from the contract agreement. This FB includes all claims raised by me from time to time irrespective of the fact whether they are admitted/accepted by the department or not. I now categorically certify that I do not have more claims in r/o this contract by found these already included in this FB by me. This amount so claimed by me shall be full and final satisfaction of all claims to the extent disallowed to me from this final bill.

Dated sd/-

CA No. CEB/MRT/07 of 2000-2001 Contractor

M/s. WM Bajaj & Sons

5. The work of the building was completed on 12.4.2003 and possession thereof was taken by the petitioner vide letter dated 16.4.2003 subject to rectification of the defects by 5.5.2003. A list of defects was pointed out to the respondent at the time of taking over of the work and the respondent was to rectify these defects as per the contract. It is after the defects were rectified that final bill was entertained and "no claim" certificate was issued by the petitioner. A perusal of correspondence and letters written by the respondent after submission of final bill would show that the petitioner had recovered a sum of Rs. 2,23,400/- from the final bill and in the correspondence the respondent was asking for refund of this money. The petitioner also asked that the bank guarantee should be released. The respondent in its letter dated 18.3.2004 to the petitioner

categorically mentioned that undisputed part of final bill had been paid to him on 11.1.2004. He only requested for the release of bank guarantee furnished by him. It is well known fact that retention money is retained by the employer during the defect liability period. The defects found at the time of taking over of building on 16.4.2003 were immediately pointed out to the respondent and the respondent was to rectify these defects.

6. In 1992(2) R.A.J 480 (Del.) Unitech Limited vs. Container Corporation of India, this Court had observed that where full and final satisfaction is acknowledged by a receipt in writing and the amount is received unconditionally there is an accord and satisfaction by settlement of all claims by the petitioner. If allegations are made subsequently of the receipt of the amount they are to be considered afterthought.

7. In the present case the respondent no. 1 could have raised only those disputes before the Arbitrator which had arisen during the currency of contract. After the contract was over and the respondent raised a bill and submitted it to the petitioner stating that the bill represented all his claims finally and nothing was left out, he could not have raised those disputes which were not covered in the bill. If the disputes were raked up later on in respect of those issues which he did not raise during the contract period, such a dispute cannot be referred to arbitration. While raising the bills the respondent had not made any claim for additional items like fixing of glazing, providing of copper wire instead of aluminum wire, laying additional lintel etc. The respondent very well knew he was having a lump sum contract of construction of the building and building was to be completed in all respects. He gave a full and final bill with a "no claim" certificate after about 3 months of the completion of the building in May, 2003. Though the payment was delayed by the Union of India the respondent would have at the most been allowed interest on the delayed part of the final bill and not in respect of his other claims, which he raked up later, beyond the contract period. In this case, no amount for extra work could have been at all allowed to the respondent since respondent was to give building complete in all respects.

8. Looking at the award it is apparent that the award passed by the learned Arbitrator is contrary to the contract. An Arbitrator is bound by the contract and cannot write a new contract for the parties. The Arbitrator awarded a sum of Rs. 5,38,000/- against additional work of fixing glazing in the main administrative block, to the respondent no. 1 on the ground that glazing was not shown in the plan of the administrative block. He also observed that the plan did not indicate provision of LB-1 plinth beam and FB-2 (Additional), which was provided by the claimant and there was discrepancy in reinforcement details of RCC Column's C-1, C-2 and C-3 and there was provision for aluminum conductor cable whereas copper conductor had been provided by the claimant/respondent. If the Arbitrator had only bothered to have a look at the contract, he would have found that since it was a lump sum contract, the contract specifically provided as under:

The lump sum amount quoted by contractor shall be deemed to include the

minor extra constructional details which may have not been specifically on drawings or given in particular specifications but are essential for the execution of works and services in the workman like manner should instruction and established during execution of work. In case of difference in items of work/minor extras/minor construction details which are to have been included in the contract lump sum, the decision of accepting officer shall be final, conclusive and binding.

9. The contract further provided that though the drawings have been given in the schedule to the contract but in case the details of some of the drawings were missing, the same shall be further provided and it shall be deemed to be included in the list of things and drawings mentioned in the contract drawings. The contract also provided that the site plan and layout plan were tentative and wherever necessary, the details shall be furnished later on and the contractor shall not be entitled for any additional amount of payment for such varied layout of the building. The contract provided that some of the items which were essential for execution and completion of entire work shall always be considered present even if their details are not shown viz. reinforcement of any RCC, dwarf wall in situations like verandah, passage etc., lintels over doors, windows and openings not shown in drawings. Clause 11.2.4 specifically provided that the hardware for doors/windows etc. though not included in the drawing, but essential for functioning and entire completion of the building, even if missed out shall be provided by the contractor and the building shall be complete in all respects from utility point of view and this shall be deemed to be included in the lump sum quote.

10. In the wake of these specific clauses in the contract, the Arbitrator could not have entertained any claim for fixing glazing or for not including plinth beam, RCC column etc. The awarding of amount of Rs. 5,38,000/- is absolutely contrary to the contract.

11. The Arbitrator has, under claim no. 9 which was for extra expenditure incurred on watch and ward staff due to alleged delay in taking over allowed a sum of Rs. 2,70,000/-. It seems the Arbitrator had determined to allow the claims of the respondent without referring to the documents. The building was complete on 12.4.2003, the last date of completion of building was 15.4.2003, the possession of the building was taken over by the petitioner on 16.4.2003 and still the Arbitrator has observed that there was delay in taking over of the building. Similarly, claim no. 1 has been allowed by the Arbitrator for sum of Rs. 8,150/- without any rhyme and reason despite the fact that respondent had given "no further claim" certificate at the time of raising final bill. Same is true in respect of claim no. 4 and claim no. 9. The only tenable part of this award is regarding release of the bank guarantee. The learned Arbitrator has directed the petitioner to release the bank guarantee against retention money of Rs. 3 lac in favour of the claimant with immediate effect. I consider that this is the only tenable part of the award. The award of the learned Arbitrator in respect of all

claims except return of bank guarantee and interest on the unpaid final bill amount from May" 03 to February" 04 @ 12%, is set aside being beyond jurisdiction. The petition of the petitioner u/s 34 of the Arbitration & Conciliation Act, 1996 is allowed in above terms.