
(2007) 11 DEL CK 0094
In the Delhi High Court
Case No : OMP No. 399 of 2002

Union of India (UOI)

APPELLANT

Vs

Associated Construction Company

RESPONDENT

Date of Decision : 14-11-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2008) 2 ARBLR 526 : (2008) 100 DRJ 58 : (2007) 10 ILR Delhi 24

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : A.K. Bhardwaj, for the Appellant; Ram Datta Shah, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—This petition u/s 34 of the Arbitration and Conciliation Act, 1996 has been filed on behalf of the Union of India challenging the award made on 11.07.2002. The learned Counsel appearing on behalf of the Union of India focused on Claim Nos. 2 and 4 which were allowed by the learned arbitrator to a certain extent in favor of the respondent. The learned Counsel for the petitioner also dwelt upon Claim No. 11 which pertains to escalation of wages.

2. Claim No. 2 pertains to the payment for RCC concrete M-20 in lieu of RCC M-15 as per the Site Order No. 4 dated 17.08.1998. The amount of the claim made by the respondent was Rs. 4,46,233.91. As against this, the arbitrator has awarded a sum of Rs. 4,23,373 in favor of the respondent. According to the learned Counsel for the petitioner, the award of this amount has been made contrary to the terms of the contract. He submitted that the respondent knew all along that the concrete that was to be used was of M-20 mix as provided in the drawings and, Therefore, he cannot claim any extra amount on being directed to use RCC M-20 for construction in respect of Item Nos. 1 and 2 of Schedule A of the contract. The arbitrator considered Clause 4.4.2(a) of the particular specifications (Section II). The said clause reads as under:

4.4.2. All RCC wherever required cast in situ/specified on drawings shall be of the following nominal mix unless otherwise mentioned elsewhere:

(a) RCC for slabs, beams, columns, fins, lintels, chajjas, staircase, landing, shelves, facia, parapet railing curbs and all other RCC work not specifically mentioned elsewhere shall be M-15 (nominal mix).

(b) xxx xxx xxx

3. The learned Counsel for the petitioner submitted that the arbitrator misinterpreted and misconstrued the expression "not specifically mentioned elsewhere" as appearing in the aforesaid clause. According to him, the drawings clearly specified that RCC M-20 was to be utilised for the entire work and not M-15. He submitted that since it was specifically mentioned in the drawings, the above clause ought to have been interpreted to mean that the respondent/contractor was to use RCC M-20 and not RCC M-15. Therefore, he submitted that the contractor/respondent could not be awarded any extra amount in respect of carrying out the constructions using RCC M-20 in place of RCC M-15 as per the Work Order No. 4 dated 17.08.1998.

4. The learned arbitrator has discussed this issue in paragraphs 4.2.6, 4.2.7 and 4.2.8 as under:

4.2.6. The matter has been examined based on submissions, arguments and various documents produced by the parties. Clause 4.4.2 on page 99 states "All RCC wherever required cast in situ/specified on drawings shall be of the following nominal mix unless otherwise mentioned elsewhere". From Clause 4.4.2(a) it is seen that M-15 normal mix concrete has been specified for RCC slabs, beams, columns, fins, lintels, chhajjas, staircase, landing, shelves, facia, parapet railing curbs and all other RCC work not specifically mentioned elsewhere. The whole issue devolved on the interpretation of word "elsewhere" which according to contractor means "in particular specifications only" and Union of India contends that it means "in particular specification as well as drawing". If the above clause is read in two parts as under, the issue gets clarified since in the beginning of the Clause 4.4.2. the operative part is that "RCC where specified on drawings shall be of following nominal mix:

(a) RCC for slabs, beams, fins, lintels, chhajjas, staircase, landing, shelves, facia, parapets - M-15.

(b) All other RCC work not specifically mentioned M-15 which means that if any other RCC work is required to be executed and mix of which has not been mentioned anywhere, it shall be M-15.

Thus, the drafter of the contract has made his intention very clear that RCC for slabs, beams, fins, lintels, chhajjas, etc. shall be of M-15 mix.

4.2.7. Further, a perusal of drawing reveals that in respect of Items 1 and 2 of Schedule "A", Part I the drawings indicate mix of concrete for all RCC as M-15

and in respect of Items 3 and 4, the mix specified in the drawing is M-20. The department's case is that RCC of M-20 mix specified in drawings for Items 3 and 4 should be followed. In my opinion this interpretation is not correct in view of plain reading of the Clause 4.4.2(a) where M-15 has been specified for specific locations and should, Therefore, be followed. Had the requirement been that M-20 is to be used for two buildings and M-15 for other two buildings, the Union of India should have worded the Clause 4.4.2(a) differently by providing two type of concrete, i.e. M-15 and M-20 for the two type of buildings or Union of India should have clearly mentioned that M-15/M-20 concrete for RCC shall be provided as indicted on drawings. Since this has not been done, the Union of India cannot claim that contract provides for M-15/M-20 concrete as shown on drawings. The rule of *contra proferentum* if applies to present situation to construct the true meaning of Clause 4.4.2(a) it goes against the Union of India.

4.2.8. In view of above the contractor's claim is sustained. However, while calculating the price escalation the contractor has considered first and last index nos./wages. This is not correct as the price escalation is to be worked out on quarterly basis. I have, Therefore, reduced the escalation amount to half the amount claimed which works out to Rs. 23,173.20. I, Therefore, award a sum of Rs. 4,23,373.00 in favor of contractor against this claim.

5. The learned Counsel for the respondent submitted that what the petitioner is seeking to do is to ask this Court to re-examine and re-interpret the terms of the contract which have already been considered in detail and for which reasons have been given by the learned arbitrator. He submitted that interpretation of a contract or a clause of a contract is purely within the domain of the arbitrator and the court considering the objections against the award would not enter into this field. For this proposition, the learned Counsel for the respondent has placed reliance on a decision of the Supreme Court in the case of *Sudarsan Trading Co. Vs. Government of Kerala and Another*, . He also placed reliance on a decision of a learned Single Judge of this Court in the case of *Ingersoll Rand India Ltd. Vs. Union of India (UOI)*, . In response to the submissions made by the learned Counsel for the respondent the learned Counsel for the petitioner placed reliance on the decision of the Supreme Court in the case of *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, to submit that the objections raised by the petitioner in respect of Claim Nos. 2 and 3 fell clearly within the ambit of Section 34 of the Arbitration and Conciliation Act, 1996.

6. Having considered the arguments raised by the counsel for the parties and after examining the decisions cited at the bar, I am of the view that this Court, in the facts of the present case, cannot have a re-look into the conclusions arrived at by the arbitrator insofar as Claim No. 2 is concerned. This is so because the arbitrator has interpreted Clause 4.4.2(a) in a particular manner and this Court would not interfere with such an interpretation. It is important to note that while considering the objections u/s 34 of the said Act this Court does not sit as a court of appeal. As such, each of the claims need not be considered as if the

court were examining a first appeal against a judgment and/or a decree. The arbitrator has examined the evidence and has come to a certain finding of fact. The learned arbitrator has also interpreted Clause 4.4.2(a) in a particular manner and this Court would not substitute its views in place of the arbitrator's in such a case.

7. In any event, there is no patent illegality that has been committed by the arbitrator in considering and construing such a clause in the manner that he did. The decision in the case of ONGC would only be applicable where a patent illegality is noted by the court. I see no such patent illegality in the award insofar as this claim is concerned. The observations of the Supreme Court in the case of Sudarsan Trading Co. as also of the High Court in Ingersoll Rand India Ltd. are noteworthy. In Sudarsan Trading Co. the Supreme Court observed that the court had no jurisdiction to substitute its own evaluation of the conclusion of law as arrived at by the arbitrator. The Supreme Court also observed that once there is no dispute as to the contract, what is the interpretation of that contract is a matter for the arbitrator and on which the court cannot substitute its own decision. This court is also mindful of the following observation of the Supreme Court in Sudarsan Trading Co. (para 36 of Arb. LR):

...The High Court, in our opinion, had no jurisdiction to examine the different items awarded clause by clause by the arbitrator and to hold that under the contract these were not sustainable in the facts found by the arbitrator.

In Ingersoll Rand India Ltd. a learned judge of this Court observed that it is the settled position of law that the arbitrator has the power and jurisdiction to appreciate the evidence on record and is also empowered to interpret a particular clause in the light of the documents on record and, thereafter, record his reasons. Although the said decision in Ingersoll Rand India Ltd. as well as the decisions in Sudarsan Trading Co. were rendered in respect of the Arbitration Act of 1940, the observations would be equally applicable to petitions under Section 34 of the 1996 Act. In Ingersoll Rand India Ltd. this Court observed that the court does not sit over the reasoning and the "appreciations" of the learned arbitrator on the record and the clauses of the contract so as to come to a contrary finding.

8. Considering the aforesaid position of law, it is apparent that this Court ought not to interfere with the finding of the learned arbitrator insofar as Claim No. 2 is concerned.

9. The learned Counsel for the petitioner's next contention was with regard to Claim No. 4. This was in respect of payment for items of work executed by the respondent which were not included in the contract and for which the petitioner had not paid the respondent. The original amount of the claim was Rs. 4 lakhs which was revised to Rs. 5,25,990.16. As against this, the learned arbitrator has awarded only a sum of Rs. 1,54,947.00. It is obvious from a reading of the award itself that the learned arbitrator has gone into the details of all the

deviation orders that were placed on the respondent by the petitioner and, on the basis of evidence on record, he has come to a finding of fact that the work which was done by the respondent was not provided for in the contract. It has also been found as a fact that the respondent was not paid for this work. Consequently, the learned arbitrator has awarded the amount that could be sustained on the basis of the evidence on record. I see no reason as to why to interfere on these findings of fact.

10. With regard to Claim No. 11, the learned Counsel for the petitioner submitted that Condition 63 has been ignored by the learned arbitrator while awarding escalation under this head. Claim No. 11 relates to payment of wages on account of escalation. The respondent had claimed an amount of Rs. 4,91,309.00 under this head in respect of escalation due to rise of minimum wages which had been raised by the government after the date of the receipt of the tender. The learned arbitrator had examined the terms of contract between the parties and particularly the special conditions of contract for arriving at an appropriate formula for granting escalation. On a detailed consideration of the said formula, the learned arbitrator has awarded a sum of Rs. 4,64,434 along with interest @ 12% on the said amount w.e.f. 19.10.2001 till the date of the award. The learned Counsel for the petitioner submitted that in terms of Condition 63 of 1AFW - 2249 the said amount could not have been allowed. He submitted that Condition 63 stipulated that if the variation in wages was less than 10% then the amount has to be ignored in terms of the proviso to that condition. He also submitted that the variation, whether it is calculated in respect of the total contract valuation or the total wage bill, is less than 10%, Therefore, the entire claim under this head ought to have been disallowed. The learned Counsel for the respondent submitted that this point was not at all argued by the learned arbitrator and the discussion in the award itself would disclose that Condition 63 is not mentioned anywhere. In any event, he submitted that the special conditions of contract have overridden Condition 63 and the calculations for escalation are to be done in terms of the special conditions.

11. After examining the contention raised by the counsel for the parties, I find that the respondent's submission that Condition 63 is not discussed at all in the award is correct. It is, Therefore, apparent that this argument was not at all raised by the learned Counsel for the Union of India before the arbitrator.

12. Therefore, it would not be appropriate for this Court to examine this question from the stand point of the applicability of the said Condition 63. Consequently, the award does not call for any interference. The petition u/s 34 raising objections to the award filed on behalf of the Union of India is dismissed. No order as to costs.