

Union of India Vs. M/s. Ktech Engineers Builders Co Pvt Ltd. and Another

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Court : Delhi

Decided On : Nov-02-2015

Judge : Badar Durrez Ahmed & Sanjeev Sachdeva

Appeal No. : FAO (OS) No. 608 of 2015

Appellant : Union of India

Respondent : M/s. Ktech Engineers Builders Co Pvt Ltd. and Another

Judgement :

Badar Durrez Ahmed, J. (Oral)

CM No. 25264/2015 (exemption)

Exemption is allowed subject to all just exceptions.

CAV 1141/2015

The learned counsel for the respondents / caveator is present.

The caveat stands discharged.

FAO(OS) 608/2015 and CM Nos 25262/2015 (delay in filing), 25263/2015 (stay)

1. This appeal is directed against the judgment dated 11.05.2015 delivered by a learned Single Judge of this Court in OMP No.331/2014, which was a petition

under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act').

2. The said petition was filed in respect of the award dated 16.12.2013 made by a sole arbitrator in disputes which had arisen between the parties. The disputes arose out of a contract entered into between the appellant and the respondent, whereby the respondent was required to construct the Army Mess and Auditorium at Delhi Cantt. The contract was entered on 22.03.2006 and the work was to be completed on 12.10.2007 (i.e. within 18 months). However, the actual date of completion was 14.12.2010. It is an admitted position that the delay in the completion of the work was not on account of the respondent but was on account of the appellant. The only issue that is sought to be raised before us is with regard to the claim Nos.1, 2, 5 and 8.

3. Claim No.1 was for an amount of Rs 26,87,549/-, which has been allowed by the Arbitrator towards reimbursement of increase in the price of cement. This issue has been examined in detail by the learned Single Judge and the decision of the Arbitrator has been confirmed. This is primarily because an identical issue with regard to increase in the price of cement was raised in an interim award dated 28.08.2009, which was passed in favour of the respondent upto 31.12.2008. The present claim was for the further period up to the actual date of completion i.e. 14.12.2010. We may point out that the petition under Section 34 filed by the appellant challenging the interim award was dismissed by a learned Single Judge of this Court. The appeal preferred by the appellant before a Division Bench, as also before the Supreme Court by way of a special leave petition, were dismissed, though on the ground of limitation. It is for these reasons that the learned Single Judge did not interfere with the award passed by the learned Arbitrator on the question of claim No.1. We see no reason to interfere with the conclusions arrived at by the learned Single Judge.

4. Claim No.5 pertains to escalation of labour employed in high-rise buildings. The same has been dealt by the learned Single Judge as under:-

16. Turning to Claim No.5 which was for escalation for labour employed in high rise building, the Court is satisfied that the learned Arbitrator has come to the

correct conclusion that the decision of the Accepting Officer on the issue could not be held to be finally binding for two reasons. One is that it involved interpretation of notifications issued by the Central Government under the Minimum Wages Act. Secondly, it was given after the Respondent had invoked the arbitration clause and even after the learned Arbitrator had been appointed. The petitioner does not appear to be justified in denying the escalation in minimum wages which was statutorily mandated. There was no occasion to recover the reimbursement already made. Consequently, the Court finds no error having been committed by the learned Arbitrator in allowing Claim No.5 as well. Claim No.8 was for interest and costs and nothing has been shown to warrant interference with the impugned Award as regards the said claim. ?

5. Although the learned counsel for the appellant sought to raise issues before us on the aforesaid claim No.5, we find no error in the decision of the learned Single Judge and, therefore, no interference is warranted. We may also note that the above extract also dealt with claim No.8 which was for interest and costs and in respect of which also the learned Single Judge did not consider the same to warrant any interference. We agree with the conclusion arrived at by the learned Single Judge.

6. The main thrust of the appellant's arguments was based on claim No.2 which was on the basis of the extension of time for completing the project which was granted by the appellant to the respondent. According to the learned counsel for the appellant, the claim was neither arbitrable nor could it be awarded. The learned counsel for the appellant submitted that the said claim was an excepted item and could not be made the subject matter of arbitration, particularly, in view of Clause 11(C) of the General Conditions of contract. It is also contended that even if it was construed to be an arbitrable dispute, Clause 11(C) prohibited the respondent from making any claim in respect of any extension of time granted for completion of project because time was of the essence.

7. On the other hand, the learned counsel for the respondent submitted that claim No.2 of the respondent was not based on Clause 11 at all. The claim was based on Clauses 7 and 9 of the General Conditions of contract which envisaged

compensation for extension of time.

8. The learned counsel for the appellant drew our attention to a Supreme Court decision in the case of Ramnath International Construction Pvt. Ltd. v. Union of India (UOI) and Anr.: (2007) 2 SCC 453 which, according to him, interpreted Clause 11(C) in a manner which was favourable to the appellant. On the other hand, the learned counsel appearing for the respondent drew our attention to a subsequent decision of the Supreme Court of a bench of co-equal strength in Asian Techs Ltd. v. Union of India (UOI) and Ors.: 2009 10 SCC 354 which also dealt with Clause 11(C) and was decided in a manner which was favourable to the respondent. It was contended by the learned counsel for the appellant that these two interpretations by the Supreme Court were available and a similar question had arisen before this Court in another matter, being Union of India v. Simplex Concrete Piles (I) Ltd., [FAO(OS) 348/2010] which was pending decision before this Court. Consequently, he submitted that the present appeal also ought to be admitted and considered alongwith the case in Simplex Concrete Piles (supra).

9. The learned counsel for the respondent, however, contended that though there was a possibility of two opinions of the Supreme Court being considered insofar as the Clause 11(C) was concerned, that question did not arise at all in the present case because the Arbitrator as also the learned Single Judge have not based their findings on Clause 11(C) but have held that Clauses 7 and 9 of the General Conditions of the contract would apply and not Clause 11(C). The learned counsel appearing on behalf of the respondent drew our attention to a decision of a Division Bench of the Bombay High Court in the case of Union of India v. Moti Enterprises: 2005(2) Mh.L.J., 791 where, a somewhat similar situation had arisen and the Court was required to examine as to whether Clause 11(C) apply. The Division Bench observed as under:-

21. The bar contained in Condition 11 (C) would operate only if the extension is granted under Clauses 11(A) and (B). The question whether the extension falls within the ambit of condition Nos. 11(A) and (B) pertains to the construction/interpretation of the agreement which falls within the jurisdiction of the Arbitrator. Condition 11 certainly required to be interpreted and construed. It is not

a clause which requires no interpretation and must simply be applied by the Arbitrator.

22. The Arbitrator after a detailed consideration and analysis of the rival contentions and of the contractual provisions held that the extension granted did not fall within the ambit of condition Nos. 11(A) and (B).

23. Firstly, the learned Arbitrator came to the conclusion that a mere statement on the part of the appellant that the extension was granted under condition No. 11 (C) is not sufficient to bring into operation the said clause. We are in respectful agreement with the same. It is certainly open to the Arbitrator to decide whether the extension was within the ambit of condition Nos. 11(A) and (B) in order to determine whether the bar contained in condition No. 11 (C) came into operation or not despite the appellant's letter granting the extension. For the appellant's statement that the extension is under Clause 11 (A) is the appellant's interpretation of the condition which is not binding on the respondent and certainly cannot bind the Arbitrator. The dispute regarding the ambit of the clause is one which fell for the decision of the Arbitration.

24. That the appellant caused the delays necessitating the extensions being granted was not disputed before us. Mr. Suresh Kumar however submitted that an extension even in such cases falls within the ambit of Clauses 11 (A) and/or (B). He submitted that condition 11(A)(vii) pertains to all extensions irrespective of the circumstances in which the same may have been necessitated. The learned Arbitrator however held that sub-clause (vii) is merely an extension of sub-Clauses (i) to (vi) which preceded it. The learned Arbitrator came to the conclusion that the extensions were necessitated by reason of the delay caused by the appellant and were therefore not governed by sub-clause (vii). He held that sub-clause (vii) cannot be considered in isolation and must be read together with sub-clauses (i) to (vi). He held that sub-clause (vii) does not encompass the reasons or causes which are within the appellant's control and where the appellant is guilty for the delay, in the present case the Arbitrator came to the conclusion that the delay was caused by the appellant which necessitated the extension.

25. We are in agreement with the construction placed on Clause 11 by the learned Arbitrator. The least that can be said is that the Arbitrator's view is a possible view ?

10. In the present case, we find that the learned Single Judge has examined the matter and concluded as under:-

11. Having considered the submissions of Mr. Mohan and Mr. Sibal on the question of arbitrability, the Court finds that the learned Arbitrator has extensively discussed the applicable case law and come to a conclusion which was a plausible view to take, considering the arbitrability of Claims 2 and 5. The decision in Ramnath International Construction Pvt. Ltd. (supra), turned on an important fact that in that case the Court found the delay could be attributable either to the contractor or the employer or to both. If in those circumstances, the contractor seeks and obtains extension of time for execution, he will not be entitled to claim compensation of any nature. However, as noted by the learned Arbitrator the subsequent decision of the Supreme Court in Asia Tech Ltd. vs. Union of India (supra) interpreted Condition 11 C where it was held that the bar on arbitrability was only as regards the department and not the Arbitrator.

12. As explained by the Bombay High Court in Union of India v. Moti Enterprises 2005 (2) Mh.LJ 791, the decision of the learned Arbitrator on whether Condition 11(C) or Conditions 7 and 9 would apply was a decision on the interpretation of the clauses of the contract. It was not a matter that was outside the scope of the contract. Thus no error was committed by the learned Arbitrator in holding Claims 2 and 5 to be arbitrable. ?

11. It would be noted from the above that the learned Single Judge has placed reliance on the decision of the Bombay High Court in Moti Enterprises (supra). We may also point out that this very aspect as to whether Clauses 7 and 9 would apply or whether Clause 11(C) would apply was considered in detail by the learned Arbitrator as would be evident from the following:

24.2.11Though UOI agreed for all the above delays and reasons thereof but granted extension of time under Condition 11 of IAFW-2249, which the contractor

protested, demanding the extension to be granted on the actual reasons i.e. large no of deviations and intermittent suspension of work. Thus the contractor requested to grant extension of time under Condition 7 of IAFW-2249 which is for the additional work/changes ordered through deviations and under Condition 9 of IAFW-2249 which is for suspension of work, since these being the actual reasons for delay. Since there was a specific provisions in the contract for grant of extension of time consequent to delays on these accounts, extension of time was to be granted under these conditions only. The Claimant had repeatedly pleaded the department to order suspension of work under Condition 9 and though UOI was fully aware of the fact it never ordered any suspension of work. During the arguments UOI stated that the extension of time under Condition 7 was not granted because as and when the DOs were placed on the contractor these were accepted without any protest by him wherein it was categorically mentioned in the DOs, that the time effect is NIL. As regards non grant of extension of time under Condition 9 UOI stated that since at no stage the work was suspended hence there is no justification in granting extension of time under this Condition of contract. Not registering protest on the DOs showing time effect as NIL does not give any liberty to the Respondent to depart from the laid down procedure drafted by the Deptt itself. As per this procedure, when extra time is needed on account of changes ordered, the extension has to be granted under condition 7. Similarly, when certain changes are envisaged in the drawings, design, or specifications for which, decision cannot be given in a reasonable time, the work or part of it has to be suspended and an extension of time is to be granted under condition 9 to the extent of the period of suspension plus 25% extra and in both these conditions there is no bar for claiming compensation. Thus to deprive the contractor his legitimate claim of compensation due to prolongation of the contract, the Respondent intentionally violated the contract provision and granted extension of time under condition 11 (rather than under condition 7 and 9) the Claimant signed the same under protest demanding extension of time under actual conditions as brought out above. However, no cognizance of the protest of the Claimant were taken and UOI kept on granting extension of time one after the other Under Condition 11 only, thus ignoring the, clear provisions of the contract. This departure from the laid down procedure of the Contract was unlawful. For this

contention, the Claimant placed strong reliance on the SC Judgment of Gujarat Urja Vikas Nigam Ltd Vs Essar Power Ltd. (Ex CH-11) in which it was held that "if a procedure is laid down in the document for doing a certain thing, it has to be done in that procedure only and not in any other manner." The provision in Clause 11 states that "(C) No claim in respect of compensation or otherwise, howsoever arising as a result of extension granted under Condition (A) and (B) shall be admitted" whereas no such provision existed in Condition 7 and Condition 9 of IAFW-2249. Thus by granting extension of time under Condition 11, UOI had availed itself a non contractual power to deny contractor's claim for damages despite an un-refutable factual position that this abnormal prolongation of the contract on account of Respondent's defaults and breaches has resulted in unbearable loss to the Claimant. It thus becomes clear that if the extension of time was granted under Conditions 7 and 9 which in my opinion were the correct conditions for grant of extension of time, there was no bar on the contractor to raise any claim on prolongation of contract. UOI in their arguments and written submissions has produced no. of judgments stating that the arbitral tribunal does not have any jurisdiction in granting relief to the Claimant having granted extension of time under Condition 11. However, all those cases are distinguishable from the subject case since in those cases the contractors either admitted that they sought and were granted extension under condition 11 or did not at all dispute that the extensions were granted under a wrong condition viz. No. 11 in lieu of the correct condition No. 7 and/or 9. Moreover, in all those cases, there was no plea from the contractors about their issuing notices for claiming damages. Likewise the extension orders showing the financial effect as 'Nil' were also accepted by the contractors. In the present case, the factual position was like this:

(a) The Claimant specifically requested for extension of time under condition 7 and 11. In this connection, one of his letters at Ex 2/111 is quite relevant in which the Claimant stated "(a) Requirement of giving notice to GE is laid down only for delays covered in condition 11(A) of IAFW-2249. Our stand all along had been that the delay was due to various changes and belated changes thereon. The situation is squarely covered under condition 7 and 9 of IAFW-2249 in which conditions there is no requirement of any such notice. (b) Notwithstanding the above, ..notice, though not necessary, had already met with. (c) As mentioned

above, the present situation neither attracts condition 11 nor involves a question of our exercising right for extension. You are contractually bound to grant reasonable extension commensurate with the type/scope of the changes involved, in terms of condition 7; and to the extent the work remained stopped/suspended plus 25% on account of the delay in deciding the changes etc, in terms of condition 9 of IAFW-2249. If no extension is granted by you, the time will be set at large, thereby giving us right to treat the contract as closed and claim damages from you for all our losses". In yet another letter Ex 2/105, the Claimant sought the extension stating the following:

.completion period would expire on 12/10/07 and unless further extension was granted, the time would be set at large, in which case execution of the further work would be without any contractual basis. Hence if the department wanted to keep the contract alive, a suitable extension should be granted which would be acceptable only on the following conditions: (i) No, compensation should be recovered from us, since the delay is on the part of the department itself. (ii) The price index for material escalation should not be frozen for the simple reason that a contractor cannot be penalized for a default of the Deptt."

(b) When the extensions were granted to him under condition 11, the Claimant signed them under protest making it clear that neither the extension under condition 11 was acceptable to him nor the Nil financial effect.

(c) Claimant issued several notices to the Respondent claiming-damages due to delay attributable to the defaults of the Respondent. Despite these notices, the Claimant's performance was accepted by the Respondent and extensions were granted. This squarely attracted the ruling of the SC Judgment of Sarvesh Chopra (Supra) based on which the Delhi High Court upheld the award of damages despite contractual bar in the case of Bharat Bijlee (Supra) which Judgment was not only upheld by the Double Bench but also by the Hon'ble Supreme Court.

(d) The Claimant also cited earlier judgments of the Supreme Court on condition 11-C viz. Shyama Charan Aggarwal (Supra) and Karam Singh Lal Vs UOI (2002(i) Arb LR 224 SC) in which despite High Courts setting aside the awards, the SC upheld the awards by overruling the High Court judgment. In the case of

Puranchand (Supra), the Punjab and Haryana High Court upheld the amount of damages relying upon the judgment of Shyama Charan Aggarwal, despite strong reliance placed by UOI on the case of Ram Nath International. The SLP of UOI was dismissed by the Hon'ble SC making it clear that even the SC preferred the judgment of Shyama Charan Aggarwal over that of Ram Nath International.

(e) The Claimant also relied upon the judgment of Asian Tech (Supra) in which in addition to upholding the amount of damages on merit of the case, the court also held that claims like 11-C places bar on Deptt to admit the claim of compensation and not on the Arbitrator. In the case of Simplex Piles (Supra) the Hon'ble Delhi High Court preferred the Judgment of Asian Tech over that of Ram Nath International mainly on the ground that condition 11-C was hit by Section 23 of the Indian Contract Act since if implemented, it defeats the rights available to the aggrieved party granted under section 55 and 73 of the Indian Contract Act.

24.2.12 On examination of the various reasons on which the extensions were sought, it is seen that changes have been ordered on the claimant as late as 20 Sep 2010 i.e. just about 3 months prior to the completion of the work. The claimant had submitted lists of changes vide Ex. CH-10, and as per this list about 80 changes were ordered out of which as many as 18 changes were ordered between May 2010 to Sep 2010. The claimant had also given details of the 97 DO's ordered on him for the above changes. As per App 'A' forming part of his SOC, the algebraic sum of these changes amounted to Rs. 4,56,40,281/- which is about 12%.of the contract amount while the arithmetic sum works out to Rs. 10,65,13,186/- which works out to about 28% of contract amount. Such enormous amount of changes and more so being ordered piecemeal and at such a belated stage had been the real cause of delay. As such the extensions were really due to the claimant mainly on Condition 7 itself since as per this Condition, the time effect has to be given while ordering changes. In fact, the E-in-C's policy instruction elaborating the requirement of Condition 7 state as under;

"Extension may also become necessary where additional work has been ordered on a contractor. through deviation order. In such cases, the extension should be decided by the competent authority while approving the Deviation Orders and

should be covered in the DO itself without waiting for application from the Contractor"

24.2.13 Therefore there remains no doubt whatsoever that when changes were ordered right up to 20 Sep 2010, the extension were due under Condition 7 only and certainly not under Condition 11 of IAFW-2249. Even though, the claimant had signed these deviation orders without any protest, this doesn't over rides the contract conditions which the Respondents were obliged to implement. Moreover, the claimant specifically sought extension under Condition 7 (or Condition 9). Beside most of the DOs were finalized much after the actual completion of the work and hence contractor's signature thereon without any protest does not make much difference.

24.2.14 The Claimant's condition that stoppage of work at several stages amounted to deemed suspension also has merit more to when he had been repeatedly asking for issue of suspension order and once even the Accepting Officer agreed in principle to issue suspension order. Thus, some extension became due to on account of Condition 9 also, though there would be some overlap of these two grounds, but this does not make any difference, because in both these conditions there is no embargo for the Contractor to claim damages.

24.2.15 Thus I am of the firm opinion that the entire delay took place on account of default of the Respondent who either stopped the work on several occasion without ordering formal suspension order under Condition 9 or who ordered piecemeal and belated changes almost up to the end of the contract and rather than granting extension under Condition 7 and/or 9, granted them under Condition 11 of IAFW-2249 just to avail the exemption against damages in terms of Condition 11-C. But this condition just does not get attracted in this case since the extension were rightfully due under condition 7 and/or 9 in both condition there is no embargo for claiming damages. ?

12. It is evident that the learned Arbitrator has examined the entire issue as to whether Clauses 7 and 9 on the one hand and Clause 11(C) on the other hand would apply. It is well settled that interpretations of clauses of a contract are within the exclusive domain of the Arbitrator. Interpreting the said clauses and based on

the factual findings, none of which have been pointed out to be perverse, the learned Arbitrator has concluded that this is not a case which fell under clause 11(C) but one which would be governed by Clauses 7 and 9 of the General Conditions of the contract. Based on the factual foundation and the interpretation placed by him, the learned Arbitrator has awarded claim No.2 in favour of the respondent. We entirely agree with the learned Single Judge that there is no cause of any interference in the decision taken by the learned Arbitrator.

13. We may also point out that the appeal is also delayed by 127 days. The explanations sought to be given for the delay in the appeal are the usual explanations which are tendered by governmental bodies of delays within their Departments. In the context of the Arbitration Act where expeditious disposal is in-built into the scheme, we cannot countenance such an explanation. Thus, even on the ground of delay we are dismissing this appeal.

14. Consequently, there is no merit in the appeal. The same is dismissed. There shall be no order as to costs.

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