

indu Engineering and Taxtile Ltd. Vs. Delhi Development Authority

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Court : Delhi

Decided On : Apr-07-1989

Reported in : 1989(2)ARBLR318(Delhi); 1989CriLJ1950; 39(1989)DLT14; ILR1989Delhi378

Judge : C.L. Chaudhry, J.

Acts : [Arbitration Act, 1940](#) - Sections 30

Appeal No. : Suit No. 944-A of 1985 and Interim Application No. 5245 of 1988

Appellant : indu Engineering and Taxtile Ltd.

Respondent : Delhi Development Authority

Advocate for Pet/Ap. : R.K. Virmani and; Harish Malhotra, Advs

Judgement :

C.L. Chandbry, J.

(1) Petitioner was awarded a contract for the supply of cast iron spigot and socket soil waste and vent pipes by D.D.A. (herein-after called the respondent). The case of the petitioner is that the terms and conditions on which supplies were contracted were revised by writing incorporated in the agreement executed on 14/05/1981 between the parties. Certain disputes arose between the parties out of the execution of the contract.

(2) The engineer member of D.D.A. by his order dated 14.12.1984 appointed Shri Banarsi Dass, Superintending Engineer, Dda to decide the matter and make an award regarding the disputes between the parties. The Arbitrator entered upon the reference and after hearing the parties made his award on 16/05/1985. The award of the Arbitrator is reproduced for the sake of convenience and reference :-

S. No. Claim` DisputeAward1.Claimants claim a sum of Arbitrator is to The claim is fullyRs. 21420.41 on account determine whether justified to the of sales tax @ 4% due to The claim of the extent of Rs.increase in the prices of claimant is justified21420.41pig iron and hard coke.? If so, to what extent ?2.Claimants claim a sum of-do-The claim is fullyRs. 234097.41 on account justified to the of increase in the price of extent of Rs.hard coke with effect from234097.41.14.2.81 including salestax @ 4%3.Claimants claim pendent-do-If payment of the light interest.awarded amount is not made within 90 days from the date ofaward, claimant shall be entitled to interest @ 9%pa. from the date of the award to the date of payment or decree whichever is earlier.

REASONS For The AWARD.

(3) Claim No. 1 : The claimants claimed a sum of Rs. 21420.41 on account of sales tax @ 4% due to increase in the prices of pig iron and hard coke. Respondents have admitted this amount in their counter statement of facts. Hence, I allow a sum of Rs 21420.41 in favor of the claimants.

(4) Claim No. 2 : The claimants claimed a sum of Rs. 234097.41 on account of increase in the prices of hard coke with effect from 14.2.81 Claimants stated that in pursuance of a notice inviting tender for supply of goods floated by the respondents, the claimants submitted their offer by their letter dated 12.2.81 on the terms and conditions quoted therein including the prices escalation clause. Thereafter, protracted negotiations took place between the claimants and the respondents when by letter dated 6.5.81 the respondents intimated to the claimants that their offer was acceptable on the terms and conditions mentioned in the said letter dated 6.5.81. However, further negotiations were held between the parties as the said acceptance letter dated 6.5.81 required certain clarifications. Accordingly, both the parties held discussions and the claimants by their letter

dated 13.5.81 clarified the outstanding points.

(5) Thereafter, the terms and conditions were incorporated in the letter dated 13.5.81 and the same was made as part of the agreement executed on 14.5.81 between the parties. It was further stated by the claimants that it was unequivocally agreed and understood by any between the parties that the prices quoted by the claimants for supply of contracted goods was based on the prices of pig iron and hard coke prevailing on 12.2.81 and any increase after 12.2.81 was to be paid by the respondents. The respondents gave their own calculations which showed that on the basis of the increase in prices of hard coke w.e.f. 14.2.81 the figure of Rs. 234097.41 is correct. However, respondents denied their liability to pay this amount on the ground that it is not payable in terms of the agreement. The respondent stated that the claimants submitted the tender after Jpc announcement of 14.2.81 and they were supposed to have given their rates on the prices prevailing on the date of submissions of tenders. Secondly, it was clear from their letter of negotiations dated 16.4.81 that the claimants were knowing the fact of increase in price of coke. They should have revised their rates at the time of negotiations. On careful consideration of facts placed before me and submissions advanced in the pleadings as well as arguments. I am of the view that the claim is justified for the reasons given below :-

(I) It is undisputed that an increase in the prices of hard coke took place w.e.f. 14.2.81. The claimants have in their offer dated 12.2.81 clearly mentioned that the prices are based on the prevailing prices of premium hard coke and pig iron. Based on this offer of the claimants further negotiations took place between the parties. The increase in question took place w.e.f. 14.2.81. There is no price escalation clause contained in the NIN similar to clause 10(c) of form PWD-7 which is otherwise there in Dda contracts. The very purpose of inserting a price escalation clause is that any intervening increase in the prices of pig iron and hard coke are taken care of.

(II) During negotiations based on the offer the claimants dated 12.2.81 the claimants by their letter dated 16.4.81 reduced the prices of goods to be supplied. However, the original price escalation clause in the offer dated 12.2.81 stood as it

was excluding payment of escalation only on account of any increase in price of ferrosilicon. Admittedly, the letter dated 12.2.81 was duly executed by and between the parties on Rs, 2.00 non-judicial stamp paper. I find no merit in contention of the respondents that in the letter dated 16.4.81 the claimants have shown their knowledge of increase in the prices of hard coke w.e f. 14.2.81 and therefore, they have taken into account the effect of the said escalation in the negotiations letter dated 16.4.81. The letter dated 16.4.81 is only in pursuance and furtherance of the offer of the claimant's letter dated 12.2.81 including the price escalation clause forming part of the agreement. In the letter dated 16.4.81 the claimants have inter alia reduced the prices of goods and modified the price escalation clause so as to exclude payment of escalation on account of increase in the prices of ferrosilicon only. Letter dated 16.4.81 only lends support to the price escalation clause of the original offer of the claimants dated 12.2.81 which says that the prices offered are based on the prevailing prices of pig iron and hard coke. The reference by the claimants to the increased price of hard coke in the last Para of their letter dated 16.4.81 is only to draw a distinction between the quality of hard coke being used by the claimants and other manufacturers and this cannot be said to have any bearing or relevance to the price escalation clause.

(III) It is further borne out from record that the letter dated 13.5.81 from the claimants to the respondents formed part of the agreement according to which any increase/decrease in prices of pig iron or premium hard coke after 12.2.81 shall be to the account of the respondents. Even from the documents placed on record by the parties, it is seen that even after 9.6.82 the claimants have requested the respondents by their letter dated 26.8.82 and 22.12.82 to pay the escalation on account of increase in question. No letter has been placed on record by the respondents to show that they denied payment of this amount to the claimants on the ground of deletion of the letter dated 13.5.81.

(IV) The original agreement as produced by the respondents only on 24.4.85 had the word deleted written across the letter dated 13.5.81 and such deletion was signed by the Ex. Engineer of the respondents alone. However, the signatures or seal of the claimants do not appear on the said letter dated 13.5.81 in support and proof of deletion. The unilateral deletion of the letter dated 13.5.81 cannot be

looked into and considered by me. Hence, such undertaking cannot be considered as part of the agreement.

(V) The Ex. Engineer concerned of the respondents had also admitted by his letter dated 12.4.83 addressed to the Chief Engineer that such escalation is payable to the claimants. The correctness of this letter was not denied by the respondents. Accordingly, I allow a sum of Rs. 234097.41 in favor of the claimants.

(6) Claim No: 3. In view of the fact that the amount has been found to be due in favor of the claimants, I allow/award interest @ 9% pa. from the date of award till payment or decree whichever is earlier on the awarded amount if the [payment of the awarded amount is not made within 90 days.]

(7) The Arbitrator filed the award in court. Notice of the filing of the award was given to the parties. The petitioner has accepted the award. However, it has been assailed on behalf of the respondent by means of objection petition under Sections 30 and 33 of the Arbitration Act being 1.A.5245/85. It is stated in the objection petition that the agreement for the supply of stores was entered into between the parties on 14.5.81. In response to the notice inviting tenders for the supply of stores, the petitioner submitted his tender on 19.2.81 with a covering letter dated 12.2.81. The date on which the tender was submitted to the respondent the price of pig iron and hard coke had increased on 14.2.81 by the suppliers of the commodity. The term relating to the price escalation incorporated in the letter dated 12.2.81 and submitted on 19.2.81 stipulated "our prices are based on prevailing prices." Thus the prices prevailing on the date of submission of tender were the same throughout and were never increased at any time after the submission of the tender and acceptance of the offer. Thereafter negotiations took place between the parties and the claimant submitted his fresh proposals vide letter dated 16/04/1981. By the said fresh proposals the contractor reduced his rates submitted vide letter dated 12.2.81 submitted on 19.2.81. The price escalation clause contained in the letter dated 12.2.81 was also modified in the following manner:

'price escalation : We agree to modify this clause to the same form accepted by the department in the previous tender with In do Swedish Pipes (from whom this

factory has been bought by us). Under that escalation is payable only on statutory increase in prices of Pig iron and Premium hara coke only.'

It was accepted by the respondent vide letter dated 6.5.1981. Thereafter the petitioner wrote letter on 13.5.1981 signifying his acceptance but he also incorporated certain conditions and stipulation which were never agreed between the parties. However, the agreement dated 14.5.1981 was signed between the parties. By inadvertance, the letter dated 13.5.1981 was also mentioned in the agreement dated 13.5.1981. In the agreement dated 14.5.81 was discovered at a later stage. The petitioner vide his letter dated 9.6.82 agreed that the letter dated 13.5.81 was to be deleted from the agreement and the letter would not form part of the agreement. The award is challenged in respect of claim No. 2 for Rs. 234097/47. on account of increase in the prices of hard coke from 14.2.81. The objections to the award are that the Arbitrator committed legal misconduct by taking into consideration extraneous matters. The Arbitrator has allowed the claim on the ground that the letter dated 13.5.81 formed part of the agreement. This approach by the Arbitrator is wholly illegal. The arbitrator had no jurisdiction to rely upon the letter dated 13.5.81 which had been specifically agreed to be deleted from the agreement by letter dated 9/06/1982 of the petitioner. The Arbitrator wholly ignored the letter dated 9.6.82. The tender of the petitioner was accepted on the terms and conditions mentioned in the letter of acceptance dated 6.5.81 and the Arbitrator had no jurisdiction to go beyond the terms and conditions on which tender was accepted. The Arbitrator has misread the letter dated 16.4.81 by which the petitioner had quoted his fresh rates.

(8) The objections are contested. In the reply it is stated that after protracted negotiations between the parties the respondent intimated to the petitioner by letter dated 6.5.81 that the petitioner's offer was accepted by the respondent on the terms and conditions mentioned in the letter. However, further negotiations were held between the parties and by letter dated 13.5.81 certain more clarifications were made by the petitioner. Thereafter, the terms and conditions agreed to between the parties were reduced to writing and incorporated in the agreement dated 14.5.81. It was clearly agreed and understood between the parties that prices quoted by the petitioner for the supply of the contracted goods

was based on the price of the pig iron and hard coke prevailing on 12.2.81 and any increase after 12.2.81 was payable by the respondent. Thereafter the petitioner supplied the contracted goods to the respondent as per specification and to the satisfaction of the respondent. After 12/02/1981 and till the execution of the contract in July, 1982 there were certain increases in the price of hard coke.

(9) The petitioner raised demand on the respondent in respect of increase in the price of pig iron and hard coke and sales tax on account of the said increase. These claims were refuted by the respondent and the matter was referred for arbitration. It has been denied that the award is liable to be set aside. It is stated that the Arbitrator is the final Judge of the facts and the courts are bound by the finding of facts and cannot review the same unless it is unsupported by evidence and unless it appears from the award that there was no evidence to support the finding. The Arbitrator considered the entire evidence and pleadings of the parties before arriving at his conclusion. The letter dated 9.6.82 was handed over to the respondent which was never accepted by them and as such it did not form part of the agreement. The respondent has purported to unilaterally delete the letter dated 13.5.81 from the agreement dated 14.5.81. The consent of the petitioner was not obtained for deleting the letter dated 13.5.81.

(10) From the pleadings of the parties the following issues were framed: -Whether the award is liable to be set aside on the objections of respondent No. 1. Dda ?Relief. The parties have led evidence by way of affidavit. The main objection of the respondent is that the Arbitrator has committed legal misconduct by ignoring the letter dated 9.6.82 which was very important and very vital document for just decision of the case. According to the respondent the Arbitrator allowed the claim on the basis of letter dated 13.5.81 which was incorporated in the agreement dated 14.5.81. The case of the respondent is that this letter dated 13.5.81 was withdrawn by subsequent letter dated 9.6.82 which was to the following effect :-

'SUB: Tender submitted by us last year for supply of cast iron spigot and socket soil waste and vent pipes. Ref: Our letter No, IET/DLI'237 dated 13.5.1981 addressed to The Executive Engineer HD-III Dda giving certain clarification on the acceptance letter No. F. I(4I)/HD-III/BD/SCI/A/453 dated 6.5.81 issued by the

Executive Engineer. With reference to the discussions held in your office today, the 9/06/1982 we hereby agree that our letter dated 13.5.1981, in which we had tried to clarify certain points may be deleted from the agreement for the above mentioned work we agree that this letter shall not form a part of the agreement.'

(11) The letter was placed on record of the Arbitrator on 15.4.85 and another copy was placed on record on 22.4.85. This letter was sheet anchor of the defense of the respondent to prove that the letter dated 13.5.81 stood deleted and did not form part of the agreement dated 14.5.81. The Arbitrator has not discussed or referred to this letter in the reasons given by him. The document was material to arrive at the just and fair decision to resolve the controversy between the parties. This amounts to legal misconduct and the award is liable to be set aside on this ground.

(12) On the other hand, it was contended on behalf of the petitioner that deletion of letter dated 13.5.81 was unilateral and it did not bear the signature of the petitioner is of no effect. The letter dated 9.6.82 was addressed to the Chief Engineer who was wholly incompetent to enter into an agreement with the petitioner. The letter dated 9.6.82 had no relevance or signature to the contract as executed between the parties on 14.5.1981.

(13) I have considered the relevant contentions of the parties and perused the award and the arbitration proceedings. The Arbitrator has taken into consideration the letter dated 13.5.81 while awarding the amount to the petitioner. The respondent Dda placed the letter dated 9.6.1982 on the record of the Arbitration proceedings in support of their contention that letter dated 13.3.81 stood deleted from the agreement. The letter dated 9.6.82 was filed before the Arbitrator on 15.4.1985 with a conversing letter stating therein that the letter dated 13.5.81 which was initially forming point of the agreement was deleted with the consent of the petitioner by letter dated 9.6.82. On 12.4.1985, the parties addressed arguments before the Arbitrator. In the minutes recorded on that date it is mentioned that it was argued on behalf of the respondent that the petitioner had withdrawn their letter dated 13.5.1981. On 24.4.1985, another copy of letter dated 9.6.82 was placed before the Arbitrator. It is so mentioned in the proceedings of that date. The case of

the petitioner before the Arbitrator in respect of this letter was that the Dda had no right to interpolate in the agreement without the consent of the petitioner. The letter dated 9.6.1982 regarding deletion of letter dated 13.5.1981 was taken after one year by exerting undue pressure as payment of the material supplied was withheld. The petitioner had no other alternative but to give such letters to the Chief Engineer who is not a competent authority. From the record it is quite clear that the respondent alleged before the Arbitrator that the letter dated 13.5.81 was subsequently deleted from the agreement by letter dated 9.6.82. The document was very vital and material. The Arbitrator has not at all referred to or discussed the effect of letter dated 9.6.1982. The document was material to arrive at the just and fair decision to resolve the controversy between the parties. It was held in *K P. Poulose v. State of Kerala*, : AIR 1975 SC1259 as under :

'UNDER Section 30(a) of the Arbitration Act an award can be set aside when an Arbitrator has misconducted himself or the proceedings. Misconduct under Section 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision'.

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