Express Engineering and Construction Company Vs. Delhi Development Authority

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Court : Delhi

Decided On : Oct-04-1994

Reported in : ILR1995Delhi66

Judge : P.K. Bahri, J.

Acts : Arbitration Act - Sections 14

Appeal No. : Suit Nos. 843 and 2613 of 1991 and Interim Application No. 1593 of 1991

Appellant : Express Engineering and Construction Company

Respondent : Delhi Development Authority

Advocate for Pet/Ap. : D.P. Sharma and; A. Salwan, Advs

Judgement :

P.K. Bahri. J.

(1) M/S. Express Engineering and Construction Company had filed the petition under Section 14 of the Arbitration Act seeking directions to respondent No. 2, sole arbitrator, for filing the award and for making the award a rule of the Court

(2) Meanwhile, the arbitrator, on his own. has filed the award dated 27th February 1991 and proceedings in this Court registered as S. No. 2613191. Notice of the filing of the award was given to both the parties and Delhi Development Authority has filed the objections to the award. The objections are opposed by the petitioner and following issues were framed :- 1. Whether the award is liable to be set aside on the grounds raised in the objection petition 2. Relief.

(3) It was directed that arbitration proceedings shall be read in evidence and the matter shall be decided by affidavits. The parties have filed the affidavits. I have heard the argument in detail and proceed to decide the case. Issue NO. 1

(4) Facts, in brief, are that Delhi Development Authority had invited tenders for the execution of the work named and styled as C/o 416 Houses (160 three bedroom Gregory Iii and 256 two bedrooms Category II) and 320 scooter garages under Self Financing Scheme at Alaknanda and SH: C/0221 Houses (85 category Iii houses and 136 category Ii houses) and 170 scooter garages Gr. I. The petitioner's tender was accepted and agreement No. 21/HD-XXXI /A/82-83 was executed between the parties which agreement was subject to general conditions of the contract.

(5) Clause 25 of the General Conditions of the contract stipulated that in case of differences arising out of the aforesaid con tract, the same was to be referred for arbitration and in accordance with clause 25 of the Arbitration Act, the matter was referred to arbitrator respondent No. 2 for adjudication vide letter dated March 5, 1990. The arbitrator, after eonsidenng the evidence led before him and the arguments advanced, had given a reasoned award. The aforesaid work was stipulated to be comp;eteby 23rd September 1983 but according to the petitioner, due to various breaches committed by Delhi Development Authority, the work could not be completed and main cause for the delay in completion of the work was that D.D A. caused lot of delay in supply of cement and G.I. pipes of diameter 20 mm. and ultimately, the work was completed by the petitioner on 31st December 1986 but the D.D.A. delayed taking of possession of the completed work till allotments were to be made to the allottees and ultimately the work was shown to be completed in the measurement book on may 30, 1987. The final bill

was paid to the petitioner on 5th June, 1988. The petitioner had before the arbitrator raised carious claims and asked for an award of Rs. 19.69.403.40 paise.

(6) As far as claim No. I was concerned, although no arguments had been advanced, I have gone through the arbitration proceedings and the award and find that in claim No. 1, the claimant petitioner had claimed Rs. 83,667.23 paise towards refund of rebate wrongfully deducted in the bills. The agreement provided that Delhi Development Authority shall avail a rebate of O.20% of the tendered cost it the running account bills are paid regularly every month. However, the evidence produced before the arbitrator depicted that out of total of 40 bills paid, 10 bills have not been paid regularly and thus, the arbitrator held that Delhi Development Authority was not entitled to avail rebate in respect of the said 10 bills which were not paid in accordance with the contract regularly and thus. he allowed the claim to the extent of Rs. 7,2961- holding 'that this rebate was not permissible.

(7) It was also provided in the agreement that rebate of O.20% was to be availed of by Delhi Development Authority if final bill was to be paid within six months of the completion of the work. It was undisputed fact that the work was completed on May 30, 1957 but the final bill was paid only on June 5, 1988. So, in view of the clear terms of the contract, the Delhi Development Authority was not justified in availing the rebate as the final bill was not paid within six months of the completion of the work and the arbitrator awarded Rs. 41.663 under this item. There is no fallacy in the reasoning of the arbitrator in awarding this amount in claim No. 1.

(8) In Claim No. 2, the claimant had claimed Rs. 58,0001- towards payment of the extra items i.e. (a) shuttering of slab of heights more than 3.5 mtrs. (b) Making holes in the walls for providing the special of Sci and rain water pip.:'s and making them good. (c) Exterior plastering above 10 metres from ground level. (d) Amount withheld in the final bill on account of non sanction of extra items. (e) Amount due on account of lower rate sanctioned for the extra item of supply of earth including stacking.

(9) The arbitrator had rejected claims (a) & (b), so I need not refer to the said claims,

(10) Coming to claim No. (c) which pertain to extra payment for exterior plaster above height of 10 metres from ground level, the arbitrator referred to clause 3.15 which laid down that the rates quoted shall hold good for all heights but he referred to C.P.W.D. Specifications 1977 (para 3.1 and 3.2) and held that the claimant was entitled to a sum of Rs.. 11,0541- for external pilaster above 10 metres height. The reasoning of the arbitrator, while rejecting the claim (a) and allowing this claim (c), is on the face of it contradictory. It .s not understood when there is a special condition in the contract provided in clause 3.15 of the contract which clearly stipulates that rates quoted shall hold good for all Ileights, there was no occasion for the arbitrator to have ignored. this specific special provision and take resort to general provisions existing b C.P.W.D. Specifications 1977. It is evident that this part of the award is against the terms of the contract. The special conditions in the contract obviously supersede the general conditions appearing in C.P.W.D. Specifications 1977. . ' 11. In Associated Engineering Co. v. Govt. of Andhra Pradesh, 1991 (2) Arb LR 180, the Supreme Court has (1) clearly, held the supreme court has (1) clearly held that arbitrator cannot act arbitrarily.

(11) Airrationally, capriciously or independently of the contract and his sole function is to arbitrate in terms of the contract. If the arbitrator has travelled outside the boundary of the contract, he would be deemed to have acted without jurisdiction. The Supreme Court, relying on observations contained in the Commercial Arbitration, Second Edition, pages 64 by Must ill and Boyd and Halsbury's Laws of England, Volume Ii Fourth Edition para 622 clearly laid down that a departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tentamount to a mala fide action and a conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

(12) So, the finding of the arbitrator in respect to this claim is clearly vitiated as it is given in contradiction with the admitted clause appearing in the contract and such an illegality is apparent from the award itself which incorporates the contract for giving this award. So, this finding of the arbitrator is liable to be set aside.

(13) The claim in clause (d) was not challenged before me.

(14) Mow coming to claim in clause (e) which pertains to rates reduced for extra item of earth work. The arbitrator mentioned that D.U.A. worked out a rate of Rs. 32.46 for earth filling during execution of the work and part rate payments were made in running account bills accordingly and at the time of the final bill, the rate was reduced to Rs. 26.27 per cu.m. The arbitrator found that on examining the analysis of rates for Rs. 26.27, it was revealed that royalty for earth was not accounted for while the sites for earth excavation were not provided by D.D.A. He mentioned that the claimant had brought earth from a distance and thus must have paid royalty for it. The arbitrator then held that ^ the rate of Rs. 32.46 paise per cubic feet which was arrived at on the basis of Dsr rules was justified and he allowed the claim to the extent of Rs. 14,326.

(15) Learned counsel for D.D.A. had argued that there was no evidence that any royalty had been paid by the contractor! petitioner while bringing the earth to the site. I do not think that on this ground the finding of tile arbitrator in this connection can be considered to be unjustified or absurd. The finding is based on Dsr basis which was adopted by the D.D.A itself while allowing the running bills. So, there was no justification for D.D.A. to have the rate of Rs. 26.27 paise per cubic feet in the final bill which was in contradiction with Dsr basis. So, the objection with regard to this claim is rejected.

(16) Coming to claim No. 6 which pertains to a sum of Rs. 17.58,550 towards compensation on account of prolongation A of work beyond 23rd September 1983 due to increase in the prices or materials, wages of labour, bank commission charges, establishment and watch & ward expenses etc. Facts are not, indeed, in dispute before the arbitrator that the work which was establishment and watch & ward expenses etc. Facts are not, September 1983 could be completed only on 30th May 1987 and the delay in execution of the work was not on account of any fault by the petitioner claiment. The delay was caused, as noticed by the arbitrator, on account of various reasons such as finalisation of layout plan, plinth levels and foundation drawings for about four months and part of the site was not available turn six months and essential materials like cement, G.I. pipes, paneled shutters, etc. were not made available in due time and finally the completion of work was not being accepted till the houses, etc. were to be allotted to the allotees and the

arbitrator categorically held that all this delay was on account of D.D.A. went on extending the time for completing the contract without levying any penalties on the contractor petitioner. The D.D.A. itself did not treat the stipulated time in the contract as essence of the contract because D.D.A. itself was responsible for the delay occurring in execution of the work.

(17) So, the short question which arose for decision before the Arbitrator was whether the claimant was entitled to have any compensation on account of increase taking place in prices of material and labour, expenses incurred for maintaining security deposit for a long period and expenditure incurred on maintaining ward & watch and for payment of supervisor for a long period.

(18) The claimant originally asked for increase of 20% over the agreed rates w.e.f. 23rd September 1983 onwards but the D.D.A. took objection that under clause 10 para 1 of the conditions of the contract, the claimant was not entitled to have any higher rates for supply of material even if there had taken place any delay. The claimant then set up the revised claim and claimed extra rates for the period 31st October 1984 onwards and deleted the claim in respect of tile period of one year 39 days because that delay occurred due to delay in supply of material like cement. In view of clause 10(c) of the contract, the arbitrator found that Rs. 8,12,704 had already been paid to the claimant in accordance with that clause but that clause was to be functional for the stipulated period of completion of the work provided in the contract. The claimant claimed 15.95% increase in the prices I but he based his claim on single tender for M.I.G. houses awarded by the D.D.A. and the. arbitrator found that same was not justified and be on the basis of C.P.W.D. building cost index which is circulated from time to time found that there had been 11% increase in the rates in between September 1982 to September. 1983 and he allowed 11% increase as compensation and awarded Rs. 515,157 only alter adjustment of the payments already made under clause 10(C). He rejected the claim of the claimant with regard to the expenditure incurred on bank commission and in regard to expenditure incurred on staff and establishment for the extended period of the completion of the work, he allowed only. expenditure incurred from 1st January 1986 to 30th May 1987 for the salary paid to two chowkidars and one supervisor @ Rs. 500 per mensem and Rs. 1,000 per mensem respectively and

total amount allowed was Rs. 25,500.

(19) Learned counsel for D.D.A. has contended that in view of clause 10(c) of the contract, the arbitrator was not legally right in allowing any claim on account of increase in price for the extended period of contract for completion of the work. It is to be emphasised at this stage that delay has occurred in completion of the contract on account of the breaches of the contract committed by the D.U.A. in law of contract, if any loss is caused to a party on account of breaches of contract taking place at the instance of the other party, the former party is entitled to have reasonable compensation damages from the other party.

(20) The exclusion clause like clause 10(c) of the contract in question had come up for discussion in various judgments. In Chitley on Contract 24th Edition, paras 813 to 816 and the book 'Building Contract' 4th Edition page 140 analyses the legal position with regard to importance of such exclusion clauses. It can be culled out from the observations made in these books that where there is a fundamental breach or a breach of a fundamental term which breach is accepted by the innocent party, the exclusion clause cannot be relied on in respect of the said breach occasioning the acceptance of the repudiation or in respect of breaches occurring thereafter. If the innocent party does not accept the breach so as to bring the contract to an end, but affirms the contract, it is a question of construction whether the clause can be relied on. It was held that normally the clause cannot be relied on if performance is totally different from that which the contract contemplates.

(21) Similar clause of a contract came up for consideration before this court in case of M/s. Salwan Construction Company v. Union of India, I.L.R. 1977 Del 748. A similar contention was raised before the court on the basis of these clauses that it was not open to the arbitrator to award a general increase in price and that at best he could award damage if the builders were able to prove it to his satisfaction. There was a non-speaking award which came up for consideration in that case. The arbitrator had awarded compensation which was not in assonancecompensatin with the said exclusion clause of the contract. The grant of damages v/as upheld, in the said case also, the delay had occurred in completing

the contract because possession of the site was not given in time ana there had taken place delay in supply of drawings and some other reasons which was attributable to the employer and it was held that damages could be awarded in such a case. It was held that it there was increase in performance of the work because of the breach of the contract on the part of the contract breaker the measure of damages will be the compensation to cover up the increase of expense or additional cost of execution. This is the loss suffered by the builders.

(22) It was a question of interpretation of the contract and the arbitrator, while interpreting clause 10(c) of the contract had come to the conclusion that the claimant is entitled to damages or compensating on account of escalation taking place in the prices due to delay occurring in completing the work and the delay was attributable to the D.D.A. The arbitrator is sole judge in giving his findings on the questions of law as well as facts unless it is shown that the interpretation given by the arbitrator is absurd or preposterous, the Court cannot say that there has occurred any illegality in giving the award which is apparent on the face of it.

(23) In Rawla Construction Company v. Union of India, 1992 Rajdhani Law Reporter 20(3), a contention was raised that in view of exclusion clause 9, 11 and 63 of the conditions of the contract, the contractor was not entiled to any compensation even if the delay in the execution of contract was caused for the reason of default on the part of the Governemnt. This contention was negatived. It was held that such provision as attempt to deprive the contractor of the right to claim the damages will be strictly construed against the employer because such a clause will have calamitous consequences for the contractor and he will have no remedy anywhere, however outrageous the conduct or behavior of the employer may be, however interminable the delay. It was further laid down that most unusual circumstances which give rise to claim was delay in giving the possession of the site to the contractor or suspension of the work caused by some act or omission of the employer, and a consequent increase of expense in the performance of the works. It was held that the work contractor will be entitled for the delay caused notwithstanding that an extension of time for completion has been granted in respect of such delay. Reliance was placed for this view on observations appearing in Emden and Gill's Building Contracts and Practice, 7th

edition page 272 and Halsbury Laws of England, 4th edition volume 4 para 1281 page 653.

(24) In M/s. Om Prakash Baldev Krishan v. Union of India, A.I.R. 1984 Del 342 also, interpretation of exclusion clause 9 of the general conditions of the contract and clause 3.1 of the special conditions of the contract came up for consideration. The court held that question of construction of contract generally speaking is question of law and arbitrator is a domestic tribunal appointed by the parties, his decision, right or wrong, is binding on the parties and erroneous decision of arbitrator on a question of law does not vitiate the award unless the error appears on the face of the award.

(25) It is question of interpretation in this case as to whether the exclusion clause 10(c) of the contract could mean that even if there had occurred breaches of the contract on the part of the employer which resulted in delay in completion of the contract, even then the contractor would not be entitled to general damages due to price escalation occurring during this period. It is true that if a particular finding of the arbitrator is in total contradiction with the stipulated conditions of the contract, then it can be said that an error of law had occurred which is apparent on the face of the award which vitiates such finding in the award. But in the present case, it is a moot point whether clause 10(c) would totally debar the claim of the petitioner for damages on account of breach of contract taking place on the part of D.D.A. and arbitrator, if had interpreted the said clause in a particular manner, it cannot be said that the said finding of the arbitrator is in contradiction with the clause in the contract so as to make his finding illegal on the face of it.

(26) Similar clause 10(c) appearing in this contract came up for consideration in case of Villayti Ram Mittal v. Union of India, 1986 (5) Arb LR 328. There also a delay had taken place in executing the contract which was attributable to Union of India. It was submitted before the Court that in view of clause 10(c), the arbitrator could not award damages on the general principles or on the principle of quantum meruit. The quantum meruit principle applies for awarding compensation for the work done or services rendered when no price is fixed in the contract in respect of the same. While holding it that the said concept of quantum meruit was not strictly

applicable it was held that arbitrator was justified in granting the compensation on the basis of general principles of law of damages despite there being exclusion clause 10(c) appearing in the contract.

(27) Reliance was placed by Single Judge on the judgment given in case of M/s Salwan. Construction Co. (supra) given in Fao (os) 29177 decided on March 20, 1981. An appeal against the said judgment was dismissed,

(28) Development Authority 28. The learned counsel for Dda has made reference to State of Kerala v. V. P. Jolly, : AIR1992 Ker187 where it has been laid down that if the arbitrator acts in contravention of the clear, obvious terms of the main contract which deals with the rights and obligations of the parties, such action would be without jurisdiction. There is no dispute about this principle of law which has also been laid down by the Supreme Court as discussed above.

(29) In the present case, it cannot be said that awarding compensation to the contractor was indirect contradiction with any clause in the contract. The exclusion clause in the contract couched in broad language in my view does not exclude the Jurisdiction of the arbitrator to grant damages where loss occurs to the contractor on account of breach of contract committed by the employer. 30. Another contention raised on behalf of D.D.A. was that the arbitrator was not Justified in relying on C.P.W.D. rates for finding out the escalation in prices of the material and once evidence relied upon by the claimant was rejected the arbitrator ought to have rejected the claim for compensation based on escalation of prices. She has referred to Bhagat Construction Company Private Limited v. Delhi Development Authority. 1991 (1) Arb LR 296. I have gone through this judgment which has no application to the facts of the present case. There has occurred some error in calculation of some amount and the Court modified the award in this connection. It is not understood how it can be held that the calculation made by the arbitrator on the basis of C.P.W.D. rates is in any manner illegal or irrational or absurd or preposterous. Hence I do not find any merit in this contention. The objection petition is liable to be decided in above terms. All objections are dismissed except the objection pertaining to clause 2(c) of claim No. 2. Issue is decided accordingly.

(30) The petition is liable to be partly allowed. I partly allow the objection petition in light of my above order and modify the award in accordance with the above judgment and make the modified award a rule of the Court and grant interest@ 9% per annum from the date of the award till realisation. Both the suit and application are disposed of.