

M/S Wee Aar Constructive Builder Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Apr-23-2001

Reported in : 93(2001)DLT744; 2002(63)DRJ616

Judge : Mr. J.D. Kapoor, J.

Acts : Arbitration Act - Sections 14

Appeal No. : Suit No. 2371 of 1996 & Ex. 70/98

Appellant : M/S Wee Aar Constructive Builder

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Ms. Ansuyya Salwan, Adv.

Advocate for Pet/Ap. : Mr. Harish Malhotra, Adv

Judgement :

Held:

However in M/s. Wee Aar Constructive Builders it was specifically observed that the DSR for 1997 now recognises straightening and cutting of steel bars as a separate item of work and provides for payment for it. However in the instant case not only this material was before the Arbitrator but the petitioner had also notified and informed the DDA vide Exhibit C-9 that he would be charging extra for the straightening and cutting of the steel.

The award is hereby affirmed as it is settled law that where two views are possible and the view taken by the Arbitrator even if erroneous should not be disturbed.

The foregoing reasons pursued me to dismiss the objections and make the award rule of the Court. The suit is decreed in favor of the petitioner and against the respondent-DDA Along with pendente lite and future interest @ 72% per cent.

J.D. Kapoor, J.

1. Pursuant to this petition under Section 14 of the Arbitration Act the original award dated 17th August, 1996 Along with the arbitration proceedings was filed. Responding to the notice for making it a rule of the Court, the respondent-DDA has preferred objections.

2. Main objections are with regard to claims No. 1 & 9. As regards the remaining claims these have been awarded well within the terms of the agreement and based upon material and evidence produced by the parties. The reasons furnished by the Arbitrator are sound and unassailable and, therefore, admit no interference.

CLAIM No. 1:

3. This claim is on account of loss of profit on items of work not allowed to be executed by the respondents. The relevant clause 13 applicable on this count reads as under:-

'If at any time after the commencement of the work the authority shall for any reason whatsoever not require the whole thereof as specified in the tender to be put the Engineer-in-Charge shall give notice in writing of the fact to the contractor who shall have no claim to any payment of compensation whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full, but did not derive in consequence of the full amount of the work not having been put, neither shall he have any claim for compensation by reasons of any alternations having been made in the original specifications, drawings, designs and instructions which shall involve any curtailment of the work as

originally contemplated.'

4. After having taken note of the fact that there was a stay from the Court as to the handing over of the site of two blocks the learned Arbitrator has allowed this claim solely on the premise that the respondent did not give notice in writing of the fact to the contractor as to the curtailment of the work already agreed and assigned and its inability to hand over the site.

5. As is apparent from clause 13 it is only in those cases where after commencement of the work the Authority for any reason whatsoever does not require the whole thereof as specified in the tender to be carried out that a notice in writing of the fact to the contractor is essential. It is contended that in the instant case the contractor also knew and the fact was also brought to his notice that a stay against handing over of the two blocks was in operation. However the decision of the respondent expressed in the letter sent in response to the request of the petitioner for handing over the remaining site was that the petitioner should continue holding over and remain at the site.

6. It appears that the respondents' intention was to get the entire work executed from the petitioner but to tell the petitioner to hold over and remain at the site for indefinite period as the respondent itself was not so sure as to what time the vacation of stay would take was nothing short of subjecting the petitioner to suffer not only loss of profitability but also incur expenditure on the infrastructure and also in the form of over head expenditure and idle tool and plant.

7. Once the petitioner had given a notice to the respondent that either they should hand over the site in question or close the contract, the minimum expectation from the respondent was to close the contract for the time being or till the decision on the stay or handing over of the site, but the respondent did neither.

8. It is contended by the learned counsel for the respondent-DDA that such an omission on the part of the respondent does not mean that the respondent did not require the execution of whole thereof as specified in the tender. Had there been any such intention on the part of the respondent it would have given notice in writing of such an intention to the contractor but by not doing so it kept the

contractor in suspended animation. Had such a notice been given, only then the contractor would have no claim to any payment of compensation whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full.

9. By allowing the petitioner to remain on the site and hold over inspire of uncertainty looming large over the fate of the stay against handing over the site amounts to breach of the contract.

10. In M/s A.T.Brij Paul Singh and Brothers Vs . State of Gujarat : AIR 1984 SC1703 it was held that where in a work contract the party entrusting the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the work contract. What must be the measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under this head is certainly admissible.

11. In view of the fact that the respondent failed to give notice in writing to the contractor as to the reasons for not requiring the whole work as specified in the tender to be carried out the petitioner was entitled to claim the damages on account of loss of profit on items of work not allowed to be executed by the respondents.

12. There is no merit in the objection raised by the respondent. The claim is confirmed.

CLAIM No. 9:

13. This claim revolves around the interpretation of item No. 3.9, which is as under :-

'The agreement item no. 3.9 of the schedule of quantities of the agreement does not mention the words 'cutting and straightening of steel reinforcement bars'.

14. The main contention of the learned counsel for the respondent in this regard is that the item 3.9 includes the process of cutting and straightening of the steel bars as according to this item the reenforcement for RCC works includes bending,

binding and placing in position complete. This also includes the process of straightening and cutting and when this clause is read with clause 42.9 of the contract the Arbitrator was not permitted to allow any claim on this count as this clause completely barred any claim in this regard. Clause 42.9 reads as under:-

'42.9 - M.S.Bars, flats, tees, angles etc. shall be issued in lengths as available in the stores. No claim on this account shall be entertained.'

15. The learned counsel for the respondent-DDA has relied upon *M/s Wee Aar Constructive Builders v. Delhi Development Authority & Anr.* in S.2456-A/96 wherein view was taken that item No. 3.7 read with Clause 42(iii) and Clause 42(ix) of the contract admits of only one interpretation, which is to the following effect:-

'The work of bending, binding and placing in position of the reinforcement of RCC work is only illustrative and therefore the description of the work being inclusive and illustrative will encompass other ancillary works and, definitely, intrinsically connected works such as' straightening and cutting the steel bars. The use of the word 'complete' in item no.3.7 also lends support to the view that I have taken. The item requires the petitioner to do the complete job of reinforcement of RCC work. This means just about everything that is necessary, including bending, binding and placing in position. If the work involves straightening and cutting the steel bars for its completion, well, so be it'.

16. In *S K Mangla v. DDA* Suit No. 181/92 decided on 22nd May, 1995 this Court took the view that in the very nature of the case reinforcement work involves cutting of steel in required sizes, bending the same and making in suitable shapes so as to be utilised in reinforcement and thus there is no question of making separate provision for cutting operation.

17. However the decisions of this Court in *K.C.Chhiber v. DDA* and *Anant Raj Agencies v. DDA* (Suit No. 1985-A/84 & is 2290/85) were distinguished inasmuch as in both these cases the petitioner had notified the DDA that the cutting of steel or straightening of steel bars was being treated as an extra item and this was not objected to by the DDA and on this account the claim of the steel bars was upheld.

18. In S.K. Mangla's case as well as in Wee Aar Constructive Builder's case no such letter was sent by the contractor to the DDA. In the instant case the petitioner had notified to the DDA that the cutting of steel or straightening of the steel bars has to be treated as an extra item of work.

19. Though on this short ground alone the award can be upheld but the very fact that both the parties tried to provide different construction to contentious clause shows that it was capable of two possible constructions.

20. According to the counsel for the petitioner had the process of cutting and strengthening been inclusive of these processes for reinforcement of the steel bars the question of non-inclusion of straightening and cutting in the analysis of rate would not have arisen. In the analysis of rates item 15 does not include the element of straightening and cutting while in the current analysis of rates the process of straightening and cutting as per item 5.13 has been taken into consideration apart from bending and placing in position complete.

21. However in M/s Wee Aar Constructive Builders it was specifically observed that the DSR for 1997 now recognises straightening and cutting of steel bars as a separate item of work and provides for payment for it. However in the instant case not only this material was before the Arbitrator but the petitioner had also notified and informed the DDA vide Exhibit C-9 that he would be charging extra for the straightening and cutting of the steel.

22. It is pertinent to mention here that a contrary view was taken by this very Court in Anant Raj Agencies v. DDA in S.570-A/95 and 656/95 and in K.C.Chhiber v. DDA in S. 1985-A/84 which was to the effect that the process of straightening and cutting could not have been included in the item pertaining to 'reinforcement of RCC work including bending, binding and placing in position complete'. However without going into the correctness of the aforesaid two decisions the instant case being distinctive from this case inasmuch as the petitioner duly notified and informed the DDA that the charges for straightening and cutting of the steel would be extra and the DDA did not raise any objection, the award in this respect needs to be affirmed.

23. In view of the foregoing discussion, the award is hereby affirmed as it is settled law that where two views are possible and the view taken by the Arbitrator even if erroneous should not be disturbed. This view was taken by the Supreme Court in Himachal Pradesh State Electricity Board v. R.J.Shah & Company 1999(2) ALR 316. The observations of the Hon'ble Supreme Court in this case are noteworthy and are as under:-

'When the Arbitrator is required to construe a contract then merely because another view may be possible the court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the Arbitrator has exceeded the jurisdiction in making the award.'

24. The foregoing reasons persuade me to dismiss the objections and make the award rule of the Court. The suit is decreed in favor of the petitioner and against the respondent-DDA Along with pendente lite and future interest @ 12% per cent.

Ex. 70/98

25. Since the award has been made rule of the Court, the amount deposited in this Court be released to the Decree Holder.

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