

Mittal Estates Private Ltd. Vs. Delhi Development Authority and ors.

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Court : Delhi

Decided On : Oct-08-2009

Reported in : 166(2010)DLT99

Judge : Valmiki J. Mehta, J.

Acts : [Arbitration Act, 1940](#) - Sections 30 and 33; Code of Civil Procedure (CPC) - Sections 35 - Order 20A

Appeal No. : C.S. (OS) No. 44A/1997

Appellant : Mittal Estates Private Ltd.

Respondent : Delhi Development Authority and ors.

Advocate for Def. : Honey Taneja, Adv.

Advocate for Pet/Ap. : Anusuya Salwan and; Neha Mittal, Advs

Judgement :

Valmiki J. Mehta, J.

1. This objection petition has been filed by the Delhi Development Authority (hereinafter referred to as the DDA) under Sections 30 and 33 of the [Arbitration Act, 1940](#) (hereinafter referred to as the Act) raising various objections to the award dated 20.11.1996 of the Arbitrator. I am proceeding with the judgment in as

much as the Counsel for the DDA had argued yesterday and today and neither yesterday nor today the Counsel for the non-objector is available. Accordingly, I have no option but to decide the case on merits in as much as Mr. Honey Taneja, Advocate, appearing as the Counsel for the non-objector says that he is not in a position to argue the matter.

2. Though DDA has raised many objections and many claims running into approximately around 40 in number, however, since except the claims which are discussed below most of the objections pertained to factual issues and therefore were not and could not be seriously pressed by the Counsel for the objector.

3. That leaves us with claim Nos. 1(e) and (f), claim No. 2.1, claim No. 3.4, claim No. 3.11, claim No. 3.17, claim No. 4.1, claim No. 4.4, claim No. 5, claim No. 6 and claim No. 7.

4. Claim Nos. 1(e) and 1(f) were the claims which pertained to claims of the contractor with respect to charges towards laying of the pipes. This issue is dealt with by the Arbitrator in from pages 18 to 21 of the award. The learned Arbitrator has arrived at a finding of fact that the claimant has been short paid and has not been paid for the entire length of laying of the cement concrete. There is a finding of fact in this regard with respect to the amount of work for which payment has not been made by the objector which has been duly considered by the Arbitrator and such finding of fact could not be challenged by any contra evidence. The Arbitrator in this regard has finally held as under:

The statement of facts for P/L C.C 1:5:10 around pipes under claim No. 1(d) have been verified from the final bill and it is seen that following payments have been made:

For Claim No. 1(e):

Item	Quantity	Difference	No. paid	not paid	-----	13.2	579.07	M
321.18	@	Rs. 39.31X	1.4641	=	Rs. 18,485.12	13.3	257.89	M

-----For Claim No. 1(f):

Item	Quantity	Difference	Paid not paid.	-----EI	5.1	536.39	M
149.78	@ Rs. 53.50	= Rs. 8013.23	13	5.2	386.61	M	-----

Thus it is very clear that the Claimants have not been paid fully for the work done by them.

Considering all aspects of the claim and submissions made by both the parties and in the interest of equity and justice, I award an amount of Rs. 26,498.00 to the Claimants.

5. The next claim with respect to which award has been passed by the Arbitrator and which has been objected to by the objector is claim No. 2. This claim of the contractor pertains to using different Sections in the steel doors and windows by the contractor. The basic contention which was raised by the objector before the Arbitrator was that the Indian Standard Specification subsequent to the entering of the contract would apply because by reference to the Indian Standard Specification according to the objector reference has necessarily to be made to the prevalent Indian Standard Specification. The Arbitrator has however held that since a specific Indian Standard Specification is mentioned in the contract, it is not open to the objector to contend to the contrary. There is nothing unreasonable about this finding of the Arbitrator and therefore this claim also has no merit. For the sake of clarity the relevant finding of the Arbitrator is reproduced as under:

(ii) The agreement (certified copy supplied by the Respondents) applicable to this contract specifies that, 'the relevant I.S.I. standard for works not covered by para 3.1.1. applies.' The relevant IS specification is IS:7452-1982 in which the Section F7B has been replaced by Section F7D. This code was issued in 1982 prior to the date of start of the work i.e. 6.10.84 i.e., about two years before this agreement came into operation. By this time the Respondent should have taken care to update the drawing for doors and windows which was prepared by the Respondents on 6.10.83. This drawing was placed as Exh.C-(144).

(iii) This drawing did not form part of the tender document but was issued during the progress of the work, as such according to my view cannot supersede the provisions of the agreement i.e., the relevant I.S. Specification. The argument of the Learned Counsel for Respondents that claimants have not given any reference

to this IS-Code while submitting their tender and if there was any ambiguity it was not pointed out by the claimants at that time or rebutted by the claimants is not tenable as the provision in the agreement about applicability of the I.S. Specification is very clear.

Accordingly, this objection of the objector therefore cannot succeed.

6. The next objection of the DDA is with respect to claim No. 3.4 awarded by the Arbitrator and which pertains to payment with respect to grills. The contention of the claimant was that it has fixed ornamental grills and consequently it is entitled to be paid at a higher rate for ornamental grills instead of plain grills.

Before this Court, the Counsel for the objector, and in my opinion rightly, has referred to the Clause of the contract being condition 3.1.1 which provides that payment is with respect to all types of grills and no distinction has been made in the Clause for plain or ornamental grills. Since there is no specific provision in the contract therefore all types of grills are covered and thus no distinction is to be made. This portion of the award of the Arbitrator being against the applicable and direct contractual clause, shows that the Arbitrator has misconducted himself and the proceedings and consequently this part of the award is liable to be set aside.

7. The next objection of the DDA pertains to claim No. 3.11 as awarded by the Arbitrator with respect to providing one coat of white shade water proof cement paint by the contractor. The contention of the claimant before the Arbitrator was that it had to put a chocolate shade on the exterior of building and had to put one coat of white water proof cement and it was entitled to extra payment for this work done. The Counsel for the objector and once again rightly has specifically referred to the relevant portion of the item of work which is reproduced as under:

item No. 9.5 which reads as follows:-'Finishing work with water proofing cement paint of approved brand and manufacture and of required shade to give an even shade- New work (three or more coats-nothing extra to be paid for finishing on rough surface of walls)

A reference to this Clause of the agreement clearly shows that it was the duty of the contractor to give the required shade which has to be an even shade. For this purpose, if to get the chocolate colour with even shade if the contractor has put one coat of white cement water proof paint it cannot be said to be any extra item of work. The contractor is expected to put as per the Clause 3 three or more coats to get the required shade and the Clause further clarifies that nothing extra will be paid for finishing on rough surface of the walls. This objection therefore to claim No. 3.11 of the award is well merited and deserves acceptance.

8. The next claim with respect to which objection has been pressed by the DDA is claim No. 3.17. This claim pertains to charges towards straightening and cutting of steel bars claimed by the contractor. This issue is no longer res integra and is fully covered by the various judgments of this court. A Division Bench of this Court has recently in the case titled as Anant Raj Agencies v. DDA (2009)2 Arb. LR 325 held that no extra payment can be made to the contractor for straightening and cutting of the steel bars. This Division Bench judgment is binding upon me and following the same it is held that the claim of the contractor in this regard with respect to straightening and cutting of steel bars was misconceived and could not have been awarded by the arbitrator. This objection also therefore succeeds and this claim of the contractor before the Arbitrator stands dismissed.

9. The next claim in respect of which objection has been made by the DDA is claim No. 4.1. This claim pertains to claim of interest charges on account of delayed payment of final bill. The Arbitrator has arrived at a finding of fact that there is in fact delay in payment of final bill to the contractor beyond the period specified in the contract and therefore the Arbitrator was justified in awarding the payment of interest for the period of delay. I, however, note that interest has been awarded as prayed for by the claimant at 18% compounded quarterly. This rate of interest in view of the recent judgments of Supreme Court referred to in the later part of the judgment is not justified and since the issue of interest is being separately taken by me, though this claim for payment of interest for delay in payment of the final bill is justified, however, the rate of interest which is to be awarded is stated hereinafter.

10. The claim No. 4.4 made before the Arbitrator is on account of the interest charges on the amount unlawfully withheld from running bills. Since there is a factual finding that there has been delay in payment of running bills by the DDA to the contractor, the award of interest on the delay in payment of the running bills is justified. Once again, however, since the Arbitrator has awarded interest @ 18% per annum as stated above while dealing with claim No. 4.1 the issue of interest is being taken in the later part of this judgment.

11. Claim No. 5 which was raised by the contractor before the Arbitrator pertains to claim for idle tools and plant, machinery, establishment etc. on account of delays for which the DDA has been held guilty in the performance of the contract. The Counsel for the objector contended that as per the Clause of the contract which provided for giving of site there could be delay in handing over the site and even then no damages could have been awarded in this regard by the Arbitrator. I, however, do not agree with this contention of the objector because the learned Arbitrator has arrived at a finding of fact and has held that various blocks of work were given much beyond the stipulated period of completion of contract and therefore it could not have been the intention of the parties to the contract that delay could also be beyond the original period provided in the contract and yet no damages would be payable. Further, the learned Arbitrator has also held that the cause of delay is not only delay in the providing of site in parts by the objector/DDA but on account of various factors for which the DDA has been held guilty. Accordingly, damages have been awarded in favour of the claimant by the Arbitrator. The relevant portion of the award dealing with this issue is reproduced below:

But considering the submission as made by the Claimants as below: emphasis of the respondents is just on one thing, i.e. that no damages can be awarded when the site is handed over in parts. Other factors as given below which led to prolongation of the time of contract much beyond the stipulated period in the agreement have been ignored by the Respondents,

(i) non-availability of drawings;

- (ii) non-availability of stores beyond a period of 6 months after the stipulated date of completion;
- (iii) failure to take decisions;
- (iv) failure to convey instructions as and when required
- (v) delayed payments as per agreement and
- (vi) delayed payments due to under measurements;

Handing over of site was envisaged in parts within the contract period and not beyond. The claimants stated that as per joint record, site for as many as five blocks were handed over in extended period of contract. There is no bar, as such, for award of damages in such a situation in the agreement.

After careful study of the facts I find that site for number of blocks i.e., 1,2,9,14 and 15 was handed over on 6.1.1986 i.e., after the stipulated date of completion of the work as specified in the agreement i.e., 5.1.1986.

Accordingly to my interpretation of the agreement and various Clauses of the agreement, whatever has to happen has to happen within the period specified in the contract agreement. The reciprocal promises by the respondents have to be fulfilled within this period. The provision in the agreement for handing over of the site in parts does not mean that the site would be handed over after the period of completion as specified in the agreement.

Clause 10-CC encompasses within its fold a part of increase in prices of certain materials and a part of increase in wages of labour. It excludes from consideration the following:

- (a) Overheads, both on site and off site;
- (b) Loss of profit during the extended period of contract;
- (c) Idle machinery;
- (d) Idle centering and shuttering, scaffolding etc.;

(e) T & P

It is quite obvious that the Respondents were not mindful of their contractual obligations so much so that the drawings, decisions which were to be supplied or given by them and these were within their full control and had not been issued or decisions given in time in the beginning of the work but in piecemeal from the beginning of the work, then how could the Claimants do any planning for construction work. Further when they handed over the site of five blocks after the stipulated date of completion it would take not less than ten to eleven months to construct three to four floors and do external and internal finishing according to normal Engineering practice and time frame.

The claimants during this period would be bound down with this work thereby losing on overheads, both at site and off site, Idle machinery, Idle centering and shuttering, scaffolding etc., T & P and furthermore loss of opportunity to take up any other work or business and thus loss on profits which he could earn or other jobs. In view of above I am not in agreement with the contention of the Respondent that the Claimant can't claim damages for this contract. The claimants gets only partially compensated under Clause 10CC for labour and material and not other factors.

12. Also, a Clause in a contract cannot deny the contractor actual damages. I have recently had an occasion to consider the issue as to whether a Clause in a contract can disentitle a contractor to damages although he has suffered damages, merely because of the contractual Clause in C.S. (OS) No. 73/1996 decided on 6th October, 2009. Relying on G. Ramachandra Reddy v. Union of India : 2009(6) SCC 414, I have held that damages are payable. Relevant portion of that judgment is reproduced below:

8. I would, at this stage, refer to a recent judgment of the Supreme Court reported as G. Ramachandra Reddy and Co. v. Union of India and Anr. : 2009(6) SCC 414. The Supreme Court in this recent judgment has held that a contract cannot provide for non-payment of damages if the same are allowable in law. The following paragraphs of the judgment of Supreme Court makes this clear:

35. The award of the Arbitrator in respect of claim No. 4 has been accepted by the Division Bench Mr. B.B. Singh had drawn our attention to Clause 11(c) of the general conditions of contract to contend that in terms thereof, no damages were payable.

The question as to whether damages were payable for illegal termination of contract cannot be a subject matter of contract. The learned Arbitrator has categorically held that not only the termination of contract was illegal, the same was mala fide. Furthermore, the contention raised before us Mr. Singh has not been raised before the High Court.

In view of the ratio of the Supreme Court in this recent judgment in G. Ramachandra Reddy's case, it is clear that entitlement of damages cannot be denied on the ground of a contractual clause.

13. The Arbitrator has finally awarded to the contractor a sum of Rs. 10,74,598/- as damages towards 10% profit margin. The profit margin of 10% is clearly reasonable and there is no scope of interference in the award in this regard. The Arbitrator in this regard has referred to detailed calculations and figures as stated in the final bill and after the consideration of the different figures with respect to costs of materials etc. has finally arrived at the amount of Rs. 1,07,45,976/- as the cost of work done during the extended period and on which 10% amount of profit has been awarded. This objection of the DDA is therefore without merit and rejected because this finding of the Arbitrator is in accordance with the judgments reported as Krishna Bhagya Jal Nigam v. G. Harish Chandra : 2007(2) SCC 720, Dwarika Dass v. State of Madhya Pradesh : 1999(3) SCC 500 and a recent judgment of Division Bench of this Court not reported however entitled as DDA v. Madhur Krishna FAO (OS) No. 267/1996 decided on 19.3.2009.

14. The second last aspect/objection is with regard to the claim of the contractor towards watch and ward expenses. This claim was made on account of consequence of the delays of DDA in performance under the contract. The claimant made a claim of Rs. 18,00,000/-, however after arriving at a finding of fact that the DDA was guilty of breaches of delays the Arbitrator has however only awarded a sum of Rs. 1,26,000/- under this claim. There is, therefore, no merit

with regard to this objection also of the DDA.

15. That takes us finally to the issue with regard to what should have been the rate of interest which ought to have been awarded by the Arbitrator. The Arbitrator has awarded two rates of interest. For the pre-suit and pendente lite interest @ 15% has been awarded and future interest till the payment/decreed whichever is earlier has been awarded at 18% per annum. The recent judgments of the Supreme Court indicate that on account of change of economic scenario and the consistent fall in the rates of interest it is necessary that Courts should take into account these facts and reduce the higher rate of interest as awarded by the Arbitrator. This issue has been recently considered by a Division Bench in the case of MMTC v. Al Bamar Co. Limited : 2009 (159) DLT 513 and Union of India v. M.C. Katoch FAO(OS) No. 207/2005 decided on 23rd April 2009. In this judgment, all the recent judgments of the Supreme Court where the interest has been reduced have been referred to. These judgments of the Supreme Court are Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and Ors. 2005 (6) 678, McDermott International Inc. v. Burn Standard Co. Ltd. and Ors. : 2006 (11) SCC 181, Rajasthan State Road Transport Corporation v. Indag Rubber Ltd. : (2006) 7 SCC 700 and Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra : 2007 (2) SCC 720. Following this precedent, in the present case also, I direct that the interest uniformly should be awarded in favour of the contractor and against the DDA @ 10% per annum whether pre suit or pendente lite or future interest till payment.

In the facts and circumstances of the case interest @ 10% is reasonable and therefore I award this amount of interest @ 10% uniformly as stated above.

16. In view of provisions of Section 35 and Order 20A CPC thereof and the recent Supreme Court judgment in the case of Salem Advocate Bar Association v. Union of India : (2005) 6 SCC 344 wherein it was held that actual costs must follow the event. In this case, since most of the objections of the DDA are being dismissed and, three objections have been accepted, considering the overall facts and circumstances, I award costs of Rs. 50,000/- in favour of the non-objector and against the objector/DDA which shall be payable within a period of 8 weeks from today failing which the same shall carry interest @ 10% per annum simple.

17. The award dated 20.11.1996 is therefore made a rule of the Court, subject however to reduction therefrom of the claim amounts with respect to claim Nos. 3.4, 3.11 and 3.17 as stated above and also with regard to the uniform applicability of rate of interest till payment @ 10% per annum simple. The objection petition and the suit No. 44A/1997 is accordingly disposed of.

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