

D.D.A. Vs. Anant Raj Agencies

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Court : Delhi

Decided On : Apr-30-2012

Judge : PRADEEP NANDRAJOG & SIDDHARTH MRIDUL

Appeal No. : FAO(OS) 150 OF 2007

Appellant : D.D.A.

Respondent : Anant Raj Agencies

Judgement :

Pradeep Nandrajog, J.

Oral:

1. Heard learned counsel for the parties.

2. We are concerned in the instant appeal to the findings returned by the learned Arbitrator pertaining to Claim No.4,5,7,11 and 13. The Award is dated September 22, 1997.

3. Appellant's objections to the Award, with respect to said claims have been negated by the learned Single Judge vide impugned order dated February 13, 2007.

4. From the objections filed as also the grounds of appeal urged before us, the pleadings being laconic, unfortunately the issue in its proper perspective was not projected before the learned Single Judge and hence has not found a reflection in the impugned decision. Thus, we are constrained to write an appellate judgment as if we are dealing with the objections to the Award as the Court of first jurisdiction.

5. Claim No.4 in sum of Rs.29,90,000/- was raised by the contractor on the allegation that the contract got prolonged by nearly 44 months on account of delay attributable to DDA. The applicable clause in the contract i.e. Clause 10C recompensed the contractor increase in price of labour or material if the increase was a direct result of a fresh law or a statutory rule or a statutory order; and not the increase in the market price of the material. It was the case of the contractor that during the prolonged period of contract the price of the material rose and for which justification given by the contractor to claim Rs.29,90,000/- was as set out in Annexure 2 to the Statement of Claim.

6. Two alternatives modes of calculations were projected by the contractor. First, was with respect to All India Wholesale Price Index for all commodities and the second was with respect to the DSR rates. As per the DSR rates, when the contract was awarded and when the work was completed, cost index (DSR) raised from 105.9 points to 150 points. The difference came to 44.10 points.

7. For the work done beyond the scheduled date of completion; the work measured as per the 12th running bill, when contract period expired, and till when the work was completed, applying 44.10 points as the price to be increased, the amount payable was worked out at Rs.42,10,540/-. Since the claim was in sum of

Rs.29,90,000/-, this was the amount claimed. The second method adopted for calculation was the All India Wholesale Price Index being 290.3 when the work was awarded and it rising to 417.6 when the work was completed. For the work done beyond contract stipulated period, after deducting the material supplied by the department, the value of work was determined at Rs.95,47,712/- and multiplying the same by $(417.6 - 290.3)$ the price rise worked out was Rs.41,86,785/-, which was much above the sum of Rs.29,90,000/- claimed.

8. The learned Arbitrator has noted that as per the Engineer-in-Charge, only 1340 days delay was attributable, not to any fault of the contractor. We highlight, the Engineer-in-Charge, as was expected, would not admit that the delay was attributable to DDA. He thus opined in the negative. In any case, as long as the delay is not attributable to the contractor, the contractor would be entitled to a fair recompense for rise in price of material. Learned Arbitrator noted that Clause 10C of the contract entitled the contractor to a limited benefit of price rise in material i.e. only if the price increased due to a new law, a statutory rule or an order impacting the price. The learned Arbitrator has accordingly correctly opined that the contractor would be entitled to recompense on account of rise in price of materials during the extended period of the contract.

9. We would only highlight that the contract in question does not have Clause 10CC which is normally to be found in DDA contracts, as per which a formula is prescribed to give effect to the price rise in the cost of material.

10. The learned Arbitrator has noted that there were two methods to determine the price rise, the first was the applicable DSR rates when contract was awarded vis--vis the DSR rates by the time the work was completed. The second was the increase in the indices as per All India Wholesale Price Index.

11. Learned counsel for the appellant urges that the contractor had to file the Books of Accounts; Bills of Purchase; Invoices etc. to prove the price at which the materials were purchased by the contractor.

12. The treaties „Hudson"s Building and Engineering Contracts"has opined that in construction contracts it would become a tedious task for an Arbitrator if proof of each and every small item of work had to be led with respect to the increase in the price of materials. Hundreds of raw materials, of different kind, are consumed when a building is constructed. It is for this reason that either a fixed formula is provided for in a contract, to determine the impact of the increase in the price of material, failing which, it would be perfectly justified to determine the price rise on any other note principle. Thus, the learned Arbitrator was fully justified in determining the price rise with reference to the DSR rates as also the All India Wholesale Price Index.

13. Highlighting that the learned Arbitrator has awarded only Rs.27,92,605/- for the reason Rs.1,64,157/- was admittedly paid under Clause 10C, we find no error in the Award.

14. We would highlight that the learned Arbitrator has worked out the increase in the cost of raw material consumed with reference to the fact that the All India Wholesale Price Index was 290.3 when the contract was awarded. It rose to 419.6 by the time the work was completed. The learned Arbitrator has noted that the All India Wholesale Price Index was 342.8 when the contract stipulated date was reached. The learned Arbitrator has accordingly worked out the average cost index with reference to the cost index as per the scheduled date of completion of the work and the actual date of completion. The average comes to 380.2 points. Accordingly, the compensation has been worked out as: $Rs.95,47,712 \times \frac{380.2 - 290.3}{290.3} = Rs.29,56,762$. It is apparent that the learned Arbitrator took corrective action with reference to Annexure 2 to the Statement of Claim relating to Claim No.4, as per pleadings of the contractor and thereafter took care to deduct the amount paid under Clause 10C. We uphold the Award qua said claim. It is reasonable. Certainly, it is not perverse.

15. Claim No.5 in sum of Rs.1,06,000/- has been allowed in sum of Rs.64,437.80.

16. The dispute between the parties was DDA asserting a right to deduct a sum of Rs.1,06,000/- and in fact deducting the said sum from the final bill determined payable to the contractor. As per the contractor, DDA had supplied re-enforcement steel bars to the contractor at a fixed price. The contractor was justified in

consuming such quantity of steel re-enforcement bars as was necessary with reference to the structural drawings. Dispute raised was on account of the fact that while issuing the re-enforcement steel bars DDA weighed the steel bars and while determining the consumption took into account the linear measurement and calculated the weight on the basis of standard weight per meter of the running length. The contractor stated that the re-enforcement steel bars were not of average thickness and thus to apply the linear measurement method to determine the steel consumed was wrong. The contractor relied upon Ex.C-64, Ex.C-65, Ex.C-66 and Ex.C-67 i.e. the letters written by the contractor as and when it received the steel re-enforcement bars. The said exhibits bring out that the contractor was contemporaneously informing DDA that the steel re-enforcement bars issued were not of uniform weight.

17. The learned Arbitrator has opined that in view of the fact that steel re-enforcement bars were not of standard weight, the linear measurement method resorted to by the DDA to calculate the steel consumed with reference to the structural drawings was incorrect.

18. Suffice would it be to state that the view taken by the learned Arbitrator is reasonable. It is a possible view. Certainly, the view is not perverse. Highlighting that the learned Arbitrator has reworked the quantity of steel which ought to have been consumed with reference to the weight scale basis, has awarded, not the sum claimed but only Rs.64,437.80 we uphold the award pertaining to Claim No.5.

19. With respect to Claim No.7 in sum of Rs.1,65,000/-, the dispute was that DDA was taking a stand that pertaining to the centering and shuttering relating to beams it would make payment at a price less vis--vis the price payable for centering and shuttering pertaining to suspended floors. The contractor took the stand that since the centering and shuttering pertained to the beams which formed part of suspended floors, payment had to be paid as per CPWD specifications vide Para 5.2.8.1 and Para 5.2.9.1.

20. The learned Arbitrator has noted that in ordinary beams, centering and shuttering had to be opened and removed after 72 hours, but in case of suspended floors, the same had to be removed after between 10 days to 14 days depending upon the span of the suspended floors. Noting that the beams in question, were an integral part of suspended floors learned Arbitrator has upheld the claim.

21. Suffice would it be to state that the learned Arbitrator has given reasons for the decision; the reasons are a possible line of reasoning which could be adopted. Certainly, the reasoning is not perverse and hence we uphold the Award pertaining to Claim No.7.

22. Under Claim No.11, the contractor claimed a sum of Rs.1,30,000/- on account of the fact that the tendered documents listed only the work of cement plaster, to be executed without indicating that grooves had to be provided in plaster surface at the junction of the wall and the ceiling but while issuing the working drawings grooves were indicated as required to be made at the junction of the wall and the ceiling when plastering work was done. DDA took the stand that as per tender specifications it was clearly listed that works had to be executed as per tender specifications and the working drawing. DDA took the stand that since pertaining to the working drawings grooves were provided to be made at site, nothing extra was payable.

23. Now, a working drawing has to conform to the specifications. It is not a case where working drawings were made available to the contractor along with specifications. Thus, where the listed specifications only required cement plastering of the walls and the ceilings, the contractor would reasonably presume that the working drawings, which when later issued, would simply require plastering of the walls and the ceilings and not by providing grooves. Since DDA did not specify in the specifications that grooves had to be made at the junction of the wall and the ceiling while plastering the wall and the ceiling the contractor was justified in raising the claim. We highlight that the reasoning of the learned Arbitrator is as noted hereinabove. The reasoning is not only fair and a plausible reasoning, it is certainly not perverse. We uphold the Award pertaining to Claim No.11.

24. Pertaining to Claim No.13, Rs.10,39,856/- has been claimed and only Rs.8,22,275/- has been allowed, for

the reason, justification as per Annexure 3 to the Statement of Claim required said amount to be paid.

25. The claim by the contractor was with respect to Clause 12(A) of the contract, which stipulated that if the deviation in the work finally executed exceeded beyond 50% of the contract stipulated quantity of work, for the excess work, market value principle had to be adopted to determine the price payable for the work in excess of the quantity listed as per tender.

26. Annexure 3 to the Statement of Claim listed out the items of work where the deviation limit exceeded 50%. As noted hereinabove, the learned Arbitrator has allowed the claim but restricted the same to the value since the justification worked out was Rs.8,22,275/-.

27. A perusal of Annexure 3 to the Statement of Claim would reveal that different percentages have been applied with reference to DSR rates being 105.9 points when the contract was awarded and it rising to 150% points by the time the work was completed. We highlight one such instance pertaining to „P/F Oxidizing Iron Peg Stay“. The contract stipulated quantity was exceeded to by more than 50%. The excess quantity has been held payable by applying a price rise of 44% i.e. the difference between 150 points and 105.9 points.

28. Now, as noted hereinabove, pertaining to Claim No.4, for the entire quantity of work the price escalation for the work executed beyond the contract stipulated period has been worked out with reference to the DSR rates as also with reference to the All India Wholesale Price Index as per Annexure 2. The price comes to the same. The learned Arbitrator has determined the escalation payable under Claim No.4 with reference to All India Wholesale Price Index. There is obviously a duplication with reference to Claim No.13 and Claim No.4, and thus we set aside the Award pertaining to Clause No.13.

29. Before bringing the curtains down, we would only like to inform the learned Members of the Bar that it is useless to file objections to an Award by simply stating that „The Learned Arbitrator has erroneously allowed the claim“.

30. We note that in the objections filed to the Award, challenge to Claim No.13 has been pleaded as under:-

“Under claim No.13, the petitioner claimed Rs.10,39,856/- under Clause 12(A) for the work executed beyond the deviation limit provided in the Agreement. The claim was defended by the respondent on the ground that the total value of the contract had not exceeded the deviation limit through individual items may have exceeded and as such unless the requirements of clause 12(vi)(a)(d) were met, the petitioner could not ask for market rate. In the scheme of clause 12, the provisions of clause 12(vi) precede those of clause 12(A) and, therefore, it was only after the said provisions were exhausted that the resort can be had to be to the subsequent provision. This is clear from the reading of the entire clause 12 in its totality. The learned Arbitrator has, however, rejected the contention which is contrary to the provisions of the Agreement. The learned Arbitrator has exceeded the para-meters of the Agreement and this is an error apparent on the face of the award rendering the award liable to be set aside.”

31. It is unfortunate that while raising the objections, the issue was not brought out in its proper perspective as noted by us hereinabove.

32. The appeal is partially allowed. The impugned judgment and order dated May 13, 2007 is set aside, insofar as the appellant’s challenge to the Award relating to Claim No.13 has been negated. The Award dated May 13, 2007 is set aside, insofar as, a sum of Rs.8,22,237/- has been awarded under Claim No.13.

33. The decree would be drawn accordingly.

34. The sum awarded by the Arbitrator and as decreed by the learned Single Judge was required to be deposited by the appellant in this Court vide order dated May 11, 2007. Vide order dated July 04, 2007, the respondent was permitted to receive the said sum after furnishing security in the form of immovable property to the satisfaction of the Registrar General of this Court. The respondent could not furnish security

to the satisfaction of the Registrar General of this Court and as a result, the amount deposited by the appellant is lying invested in a Fixed Deposit.

35. Needless to state, the Registrar would disburse such amount as would now be payable to the respondent and return the remainder to the appellant.

36. With respect to the interest which has accrued on the deposit, the same would be bifurcated in proportion to the amount liable to be returned to the appellant and the amount which would now be liable to be paid to the respondent. We clarify that the liability of the appellant to pay interest as per the award would cease when the amount was deposited for the reason the interest accrued on the deposit has been directed to be apportioned between the appellant and the respondent as above.

37. Since objections have been partially succeeded there is no order being made as to costs.

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