

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 17.01.2008

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OMP. No. 385/2007

M/S PARAGON CONSTRUCTIONS(INDIA)Pvt Ltd ...Petitioner.

- versus -

UNION OF INDIA & ANOTHER

...Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Sandeep Sharma.

For the Respondent No.1 : Ms Reeta Kaul.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J(ORAL)

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 whereby the award made by the sole arbitrator (Mr K.K. Verma) on 19.05.2007 has been challenged. The learned counsel for the petitioner submitted that the petitioner had preferred two claims as well as the claim for interest in respect thereof. The learned

arbitrator has denied the claims of the petitioner and has passed a nil award.

2. The arbitration was in respect of disputes which had arisen in respect of the expansion of SGM Hospital Mangolpuri by adding a 150-bedded maternity and child block, a 26-bedded emergency ward block and ancillary facilities. The petitioner was to undertake the building works and internal services including internal electrical works by virtue of the agreement No.41/EE/PWD-26/2003-04. The initial period contemplated for completion of the work was 24 months. The date of commencement, as per the agreement, was 19.08.2003. Consequently, the completion of the work was contemplated by 18.08.2005. The work, however, was actually completed on 20.04.2006. Claim No.1 was for a sum of Rs 30,64,000/- on account of escalation attributable to the delay on the part of the respondent and or its agencies. The finding of the learned arbitrator was :

“Claimants were able to substantiate their contention that but for the delay attributable to the other agencies of respondents, they were well equipped to complete the work before the stipulated date of completion of 18.08.2005.”

Despite this finding, the learned arbitrator has not awarded any amount in respect of the claim by construing the provisions of clause 10CC, as modified, the relevant portion of which reads as under :

“If the prices of material.....and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied subject to the condition that such compensation for escalation in prices shall be payable only for the work done during the stipulated period of contract. No escalation shall be paid for the extended period even if extension of time is granted without any action under clause 2 and also no such compensation shall be payable for a work for which the stipulated period of completion is 18 months or less.”

(underlining added)

3. The learned arbitrator felt that since no escalation could be paid for the extended period even if the extension of time was granted without any action under clause 2, the petitioner's claim for escalation, even *de hors* clause 10CC, could not be permitted. The learned counsel for the petitioner has drawn my attention to a decision of a learned Single Judge of this court in the case of **Anurodh Constructions v DDA 2005** (*Suppl*) ***Arb. LR 258 (Delhi)*** wherein it was held that :

“The damages are liable to be awarded once it is found that it is the respondent who is responsible for the delay and such damages can be awarded under Section 73 of the Contract Act. Use of clause 10CC, which is utilised in other contracts by DDA itself, can be said to be a good

parameter and methodology to calculate such damages and the same cannot be faulted.”

4. The learned counsel for the petitioner also referred to the decision of the Bombay High Court in the case of **Union of India v. Shyama Charan Agarwala & Sons : 1997(2) Arb. LR 575.** In that case, the arbitrator had awarded a sum of Rs 20,95,255/- to the claimants by way of compensation for extra expenses and losses alleged to have been incurred or suffered by the respondents due to prolongation of the contract period on account of various breaches of the said contract alleged to have been committed by the petitioners therein. Clause 11(C) of the contract between the parties, in the case before the Bombay High Court, provided that :

“No claim in respect of compensation of or otherwise howsoever arising, as a result of extension granted under Conditions A and B above shall be admitted.”

The learned Single Judge of the Bombay High Court construed this provision to be a bar for the grant of any compensation and, therefore, allowed the objection of the petitioner therein and set aside the award in respect of the said sum of Rs 20,95,255/- which had been awarded to the claimants. The matter was taken up in appeal before a Division Bench of the Bombay High Court which agreed with the conclusions arrived at by

the learned Single Judge and dismissed the appeal. The decision of the Division Bench is reported in *M/s Shyama Charan Agarwala & Sons v. Union of India : 1999 (1) Arb. LR 483*. The relevant portion of the said decision is as under :

“5. If this is the position, it cannot be said that extensions which were granted by the respondents for execution of the work are not covered by Clauses 11(A) or (B) of the Agreement. Extensions were granted at the request of the appellants. As per Clause 11(A), extensions of time granted are final and binding on the contractor. Further, he has never raised any dispute for such extensions. Otherwise matter would have been referred to the C.W.E. Once the said extensions are covered under Clauses 11(A) or (B) of the Agreement, under Clause 11(C) neither party to the agreement is entitled to claim compensation or otherwise howsoever arising as a result of extensions granted under Conditions (A) and (B) of Clause 11. Therefore, in our view, the learned Single Judge rightly set aside the award passed by the learned Arbitrator by misconstruing the aforesaid clauses of the agreement.”

5. Thereafter, the matter was taken to the Supreme Court and the decision is reported as *Shyama Charan Agarwala & Sons v Union of India : 1999(1) Arb. LR 699*. The Supreme Court passed the following order :

“2. In view of the decision of this court in *K.R.Ravindran v State of Kerala*¹, the appeal is allowed and the impugned judgment and order of the High Court is set aside. There will be, therefore, a decree also in respect of Claim No.8 of the Award.”

¹ 1996(10)SCC 35

The net result being that the award of Rs 20,95,255/- under claim No.8 was reinstated and a decree was passed also in respect of the said amount in favour of the claimants. This clearly implies that despite the existence of a clause such as clause 11(C) as indicated above, the Supreme Court, placing the reliance on the earlier decision in the case of **K.R. Raveendranathan v State of Kerala : (1996) 10 SCC 35**, deemed it fit and proper to allow the claim of damages.

6. In view of these decisions, it is clear that the claimant's claim cannot be blocked out merely upon a reading of the said clause 10CC of the contract between the parties. As made clear in the award itself, the petitioner was claiming the amount under claim No.1 not upon an application of clause 10CC but *de hors* the same and by way of damages under Section 73 of the Indian Contract Act, 1872. That being the case, I am of the view that the award is liable to be set aside in respect of the conclusion of the learned arbitrator with regard to claim No.1. However, the petitioner would have to establish, through evidence, the extent of damages it has suffered. This cannot be gone into by this court at this stage because no such material is available to this court. Consequently, the award in respect of the claim No.1 is set aside and the parties are

directed to go in for arbitration afresh in respect of this claim. It shall be open to the parties to lead evidence with regard to this claim.

7. Claim No.2 was with regard to the bonus for allegedly completing the work ahead of the schedule. The clause pertaining to bonus reads as under :

“In case, the contractor completes the work ahead of scheduled completion time a bonus @ 1% (one percent) of the tendered value per month computed on per day basis shall be payable to the contractor, subject to a maximum limit of 5% (five percent) of the tendered value. The amount of bonus if payable, shall be paid along with the final bill after the completion of work.”

The learned arbitrator held in favour of the petitioner as under :

“There is enough evidence on record to infer that claimants could have completed the work ahead of schedule but the extent of ahead of schedule would always remain indeterminate.”

Despite such finding, the learned arbitrator has not awarded any sum to the petitioner by way of bonus because, according to him, the work was not completed before the stipulated date and, therefore, no bonus was payable. I am unable to agree with this conclusion because the learned arbitrator had already held that the delay was attributable to the respondent. What the arbitrator ought to have done was to compute the

period of delay that was attributable to the respondent and subtract it from the total period. If the result was a period less than 24 months then the petitioner would be entitled to bonus and the exact extent of the bonus could also be easily calculated. Unfortunately, the learned arbitrator has not done this. Consequently, the award is set aside in respect of the claim No.2 also.

8. Claim Nos 3 and 4 pertain to interest and costs of proceedings and conclusion in respect of that would also follow suit. The award is, therefore, set aside and the parties are directed to go in for arbitration afresh. For this purpose, in terms of clause 25 of the agreement between the parties, the Chief Engineer CPWD incharge of the works or if there be no Chief Engineer, the Administrative head of CPWD shall appoint another sole arbitrator to adjudicate the disputes between the parties. The said appointment be made within a period of four weeks.

This petition stands disposed of.

BADAR DURREZ AHMED
(JUDGE)

January 17, 2008
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