

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 15th September, 2009

Date of Order: 23rd December, 2009

OMP No. 451/2006

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23.12.2009

Executive Engineer

... Petitioner

Through: Mr. Rohit Madan, Advocate

Versus

M/s Nav Nirman Construction Co.

... Respondent

Through: Mr. G.K.Sharma, Advocate

JUSTICE SHIV NARAYAN DHINGRA

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 judgment should be reported in Digest? Yes.

JUDGMENT

By this Order I shall dispose of objections filed by the petitioner under Section 34 of the Arbitration & Conciliation Act, 1996 against an award dated 19.4.2006 passed by the Arbitrator. By this award the learned Arbitrator had allowed following amounts in favour of the respondent:

Amount (in Rupees)

Claim No.1	-	1,00,000/-
Claim No.2	-	98,000/-
Claim No.3	-	25,000/-
Claim No.4	-	38,656/-
Claim No.5	-	1,31,652/-

Claim No.6	-	1,25,000/-
Claim No.12	-	6,00,000/-
Claim No.14	-	50,000/-
Claim No.16	-	20,000/-
Claim No.20	-	63,641.75
Claims No. 27-46	-	1,46,777/-
Total	=	Rs.13,98726.75/-

2. Brief facts relevant for the purpose of considering this petition are that the respondent was awarded a contract of construction of inlet/outflow structure of 'DDA Storm Water drain' at R.D.12940M(R/B) of Supplementary Drain. The respondent had given a bid for this work at Rs.20,23,116/-. The tender/bid of the respondent was accepted by petitioner vide letter dated 11.5.1992. The stipulated date of start of work was 18th May, 1992 and date of completion of work was 17th October, 1992 i.e. the work was to be completed within five months of opening of tender. However, the contractor had not completed the work within this period for several reasons and the time period was extended from time to time. The work was ultimately completed on 30th October, 1997 i.e. almost five years after the stipulated date of completion. The contractor's submitted final bill after completion of work. The contractor raised a dispute after submission of final bill that he was entitled for additional payments and invoked arbitration clause on 14th August, 2000. The petitioner did not appoint the Arbitrator and the respondent then moved an application under Section 11(6) of the Arbitration & Conciliation Act, 1996 and vide order dated 21st April, 2003 in AA no. 45/2003, the present Arbitrator was appointed and gave the aforesaid award which is under challenge.

3. The award is challenged by the petitioner on the ground that the award was contrary to agreement and contrary to substantiate provisions of the

contract between the parties and even contrary to provisions of law and patently illegal. It was contrary to public policy.

4. It is submitted that the Arbitrator gave award contrary to facts and law, without assigning any reasons and contrary to clause 25 of the Contract which specifically provided that the Arbitrator was to give reasons. The Arbitrator allowed claims of the respondent merely on the presumptions and approximation and blindly accepted the claims of the respondent without any evidence in proof. The Arbitrator also did not consider that the respondent had entered several remarks in the site order book wrongfully and illegally to substantiate his assertions and claims. It is stated that the Arbitrator ignored and violated conditions of the contract/agreement and the award made by the Arbitrator in respect of different claims was beyond the scope of contract and the agreement. It is stated that the Arbitrator acted without jurisdiction. It is also submitted that the Arbitrator wrongfully allowed 12% interest.

5. It is settled law that while considering objections under Section 34 of the Arbitration & Conciliation act, the Court cannot sit in appeal and consider the award on merits. The award can be set aside only if the award falls within the mischief of Section 34 of the Arbitration & Conciliation Act.

6. Clause 7 of the contract entered into between the parties specifically provided that the contractor has to raise running bills from time to time on the basis of measurements of the work done and the payments made from time to time shall be treated as advance payments. If there is any dispute about any items of the work then the undisputed item or items only shall be paid within the period of three months, if the amount of contract and that of additional items was upto Rs.2 lac and in six months if amount exceeded Rs.2 lac, as the case may be and the contractor had to submit a list of disputed items within 30 days from the disallowance thereof and if he failed to do so, his claim shall be deemed to have been fully waived.

7. It is well known that in civil contracts, as the work progresses the measurement of the work done has to be taken from time to time and recorded in

measurement book and running bills are to be raised at different stages in accordance with the measurements as recorded in measurement book duly signed by the Engineer Incharge/Supervisor of the department. Even the disputed items are to be recorded in measurement books. If any substituted or any extra item is executed by the contractor the same has to be recorded in the measurement book. Measurement book is the record of the work done. In case the payment is not made to the contractor in respect of a recorded work, the contractor can raise a dispute validly as provided under this clause. After various running bills are over then the final bill is prepared. The final bill is the stage where the payment of the contractor is to be settled finally.

8. Clause 8 provides that a bill has to be submitted by contractor each month on or before the date fixed by the Engineer Incharge and all works executed in the previous month, duly measured, should be included in such monthly bills and these measurements are to be verified by the Engineer Incharge. In case of failure of contractor to submit the bills, the Engineer Incharge can depute somebody for measuring the work. Clause 8A provides that before taking measurement of the work done, the Engineer Incharge or Subordinate deputed by him, shall give a reasonable notice to the contractor. Clause 9 provides that Contractor shall submit all bills in printed forms mentioning the rates specified in tender and in case of extra work ordered in pursuance of the conditions, the rates for such work shall also be provided. Thus, it is clear from the contract that the contractor has to record the measurement of the work done from time to time in measurement book and raise bill and in case of disputed items submit his bill to the Engineer Incharge for his consideration after every running bill. There is no provision in the entire contract that the contractor can make claim in respect of an item for which there is no measurement in the measurement book. What I find from the award that the learned Arbitrator has not at all referred to the contract, not at all referred to the measurement book and has allowed claims of the contractor on the basis of assertions made by the contractor that he had done additional work because of an act of the petitioner of flooding the drain with storm water from other area.

9. Clause 12 of the contract provides that in case there are any substituted or additional items which the contractor is asked to do and which are not provided in the contract the contractor has to work out the rates for such additional or substituted item derived from the rates for a similar class of work. Clause 16 provides that the contractor shall give not less than 7 days' notice in writing to the Engineer Incharge or his authorized subordinate in charge of the work before covering up or otherwise placing beyond the reach of measurement in work in order that the same be measured and correct dimension thereof be taken before the same is so covered up and placed beyond the reach of measurement.

10. Above clauses of contract make it abundantly clear that only those claims could have been raised by the contractor which were recorded in the measurement book but were not paid to him and he had raised a dispute during currency of the contract. A contractor is not at liberty to seek payment in respect of those items by way of arbitration for which he did not raise a claim during currency of the contract whether they were substituted items or extra items. He can raise dispute in respect of execution of work regarding extra items or substituted items up to his concluding the contractual work and he can raise dispute before the Arbitrator only of those items which he executed as per measurement book but were not paid to him either due to disputed measurement or due to disputed rates. He is not at liberty to raise claim before the Arbitrator in respect of those works which are not recorded anywhere in the measurement book or in respect of those extra/substituted items for which no order was placed. The learned Arbitrator however, in this case entertained all those claims which were not covered by the contract and for which no dispute was raised by the claimant during raising of monthly bills or final bill. These claims were raised by the claimant first time after the final bill was prepared. The Supreme Court in State of J&K v. Dev Dutt Pandit AIR 1999 SC 3196 held as under:

15. The Contractor has to be paid on the basis of measurement of the work done by him. Local Commissioner measured the work done by the contractor in presence of both the parties and thereafter he submitted his report. On the basis of measurement so recorded by

the Local Commissioner the contractor prepared the final bill of claim for Rs.14,32,436/- and after taking out the amount already paid to him, made claim for the balance. It is difficult to see how claims made under items 13 and 14 could be said to be either new claims or outside the terms of the contract. Under clause 5 of the contract, the contractor is to be paid for the work executed by him under the contract at the rates specified therein.

16. Under clause 17 of the contract it is the contractor, who is responsible for any damage or loss to the work or part thereof caused due to any reason whatsoever and be at his own cost is required to repair and to make good of loss or damage. Contractor, therefore, could not claim any loss done to him on account of early onset of monsoon or otherwise. Similarly, under the terms of the contract he cannot claim any amounts towards idle labour. As a matter of fact under clause 69 these claims are not entertainable at all. Mr. Thakur for the contractor said that "idle employees" as mentioned in clause 69 of the contract is not the same thing as "idle labour". According to him, the term "idle employees" would mean regular employees on the roll of the contractor like Engineers etc. We do not think such a restricted construction can be put on the term "idle employees" as not included idle labour as well. Read as whole skilled and unskilled labour are all employees of the contractor under the contract.

11. Pleas taken by the respondent and accepted by the Arbitrator for delays in completion of work are amusing. The total work was to be completed within a period of five months. The tender document made it very clear. According to respondent there was delay in furnishing of drawing. Though the tender document itself had a drawing but this drawing was not an execution drawing and as per contractor, the execution drawing was supplied i.e. on 10th October, 1992 just one week before the scheduled date of completion. Considering that there was a delay in supplying of the drawing, although petitioner's contention has been that the structural drawing was supplied to the contractor just by the time the contractor had reached the stage of laying the RCC, there can be no explanation of taking five years more in doing a work which was to be done within five months. The only ground given by the contractor in his claim is that the work could not be completed due to rainy season and storage of water in the drain for which hindrance has been recorded

in the hindrance register. The record filed by the contractor shows that the rainy season was already over and last rain of the season had taken place on 15th September, 1992. Whatever had been the hindrance due to rainy season, this was known to the contractor that he was going to construct storm water drain and the contract was awarded to him in May i.e. just before the start of rainy season and the contract was to come to an end on 17th October, 1992 i.e. about a month after the end of rainy season. Rainy season in Delhi starts from 29th June and major rains are over by August. Rain after August takes place only on few occasions and Delhi had since long ceased to have heavy rains. Despite all this, the work took five years instead of five month and the learned Arbitrator has rewarded the contractor by awarding a sum of Rs.13 lac odd amount against a total contract of Rs.20,23,116/-. Why would not any contractor delay the work and get rewarded?

12. The arbitration clause in this case was a peculiar clause which provided that it would be a term of the contract that no persons other than a person appointed by the such DG of works/Chief Engineer or Administrative Head of CPWD(DA) Zone as aforesaid should act as Arbitrator and if for any reason that is not possible the matter is not to be referred to the arbitration at all. A similar provision had come for consideration before this Court in case of M/s Arvind Construction Company Pvt. Ltd. v. Union of India & Ors. Arb. Petition No. 219/2008 decided on 2nd March, 2009, wherein this Court observed as under:

6. I consider that in the present case Court has to keep in view of the peculiar Arbitration Clause between the parties. The Arbitration Clause reads as under:

“(a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or by the Special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units; by any Member of the Railway Board, in the case of contracts entered into by the railway Board and by the head of the Organization in respect of contract entered into by the other Organizations

under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

(b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all. (emphasis added)

(d)

(e)

(f)

(g)

(h)"

7. From a bare perusal of the Arbitration Clauses, it is obvious that the parties had agreed that the matter would either be referred to the Arbitrator appointed by the respondent in accordance with clause 2900 (a) or there shall be no arbitration at all in view of clause 2900 (c) of the contract.

8. It is settled law that parties are bound by the contract entered into between them including the arbitration clause. If the Arbitration Clause provides that the arbitration proceedings shall be conducted only by a particular arbitrator otherwise there shall be no arbitration and the matter can be taken up under ordinary civil law,

the petitioner does not have a right to get other arbitrator appointed through the Court under Section 11(6) of the said Act. The petitioner entered into this Arbitration Clause knowing fully well the implication of the Arbitration Clause. The petitioner is bound by the entire arbitration clause and not only a part thereof. Since no Arbitrator had been appointed by the respondent, the petitioner was at liberty to approach the civil court. The petitioner has asked for appointment of an arbitrator through this Court. In view of the judgment of the Supreme Court in Patel Engineering (supra) considering that emphasis of the Court has to be on the terms of the agreement being adhered to and given effect as closely as possible, I consider the Court cannot write new terms of the agreement between the parties and appoint an arbitrator outside the agreement.

13. This Court again considered the same point in judgment rendered in Arb. Petition No. 451/2008 Engineering Development Corporation v. Municipal Corporation of Delhi & Anr. decided on 22.9.2009 and held as under:

6. *A perusal of letter dated 23rd April 2006 written by petitioner to respondent shows that the petitioner told respondent to close the contract and refund the earnest money and release the bank guarantee given for performance of the contract. The petitioner had not raised a dispute in respect of losses suffered by the petitioner. It is apparent that the petitioner did not comply with the terms of the arbitration clause relied upon by the petitioner which specifically provides that every notice of arbitration shall specify the quantum of amount claimed and specify the list of disputes that the amount claimed in respect of each dispute. Moreover, the arbitration clause provides that if for any reason appointment of an arbitrator was not done by MCD, the matter shall not be referred to arbitration at all. This clause had come for consideration of this Court in Arbitration Petition 219 of 2008 M/s Arvind Construction Company Pvt. Ltd. Versus Union of India & Ors and this Court observed that the parties are bound by the contract entered into between them, including the arbitration clause and if the clause provides that the arbitration proceedings shall be conducted only by a particular arbitrator failing which there shall not be no arbitration, the dispute can be taken up before ordinary civil Court and the petitioner does not have a right to get the an arbitrator appointed through the Court under Section 11 of the Act. The Supreme Court in Indian Oil Corporation Limited and others v Raja Transport Private Limited (2009) 11 Scale 672 held as under:*

“It is quite common for governments, statutory corporation and PSUs’ while entering into contracts, to provide for settlement of disputes by arbitration and further provide that the Arbitrator will be one of its senior officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a Govt./statutory corporation/PSU containing an arbitration agreement providing that one of its Secretaries/ Directors shall be arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of disputes by arbitration, but not by the named arbitrator who is an employee of the other party. No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act.

A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment produces relating to the named arbitrator contained in the Arbitration clause.”

14. I consider that appointment of Arbitrator in this case was contrary to the contract. At the time this Court appointed Arbitrator, attention of the Court was not drawn to the special arbitration clause which provided that no other person could act as Arbitrator except as provided in the clause and failing which the arbitration clause itself goes. The Arbitrator therefore acted without jurisdiction and the award itself is without jurisdiction and is liable to be set aside on this ground alone. I, therefore, allow the objections of the petitioner and the award dated 19.4.2006 passed by the Arbitrator is hereby set aside.

December 23, 2009
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SHIV NARAYAN DHINGRA, J.