

24~

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

Date of Decision: 19.08.2010

+ CS(OS) 1592/2008 & I.A.12928/08

M/S KAPCO ART PVT LTD Plaintiff
Through: Mr. Sanjay Poddar, Advocate.

versus

KHADI GRAMODYOG BHAWAN & ANOTHER Defendant
Through: Mr. G. K. Srivasatava, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may
be allowed to see the judgment? : No
2. To be referred to Reporter or not? : No
3. Whether the judgment should be reported
in the Digest? : No

VIPIN SANGHI, J. (Oral)

By the aforesaid application preferred under Section 30 of the Arbitration Act, 1940, the respondent has raised objections to the award dated 19.03.2008 passed by Shri N.P.Singh, Sole Arbitrator arising out of the agreement dated 17.07.1984 executed between the parties. Under this agreement, the petitioner herein had undertaken to carry out renovation of Khadi Gramodyog Bhawan on turn key basis as per contract conditions. The total contract work

was valued at Rs. 15 lakhs. The work awarded by the respondent was accepted by the petitioner herein who agreed to complete the same by the stipulated date i.e. on or before 20.09.1984. The work was completed on 02.10.1984 according to the petitioner. However, according to the respondent, the same was completed on 03.10.1984. Under the contract terms, the defect liability period was six months from the date of co

During the execution of the said work, the respondent had required the petitioner-claimant to carry out additional works. In this regard, letter dated 03.08.1984 was issued by the respondent. The additional work was also required to be completed within the same time frame as fixed for the originally awarded work.

After the completion of the work, the petitioner-claimant submitted his bill which was not settled. Consequently disputes and differences arose between the parties.

The petitioner invoked the arbitration agreement vide notice dated 19.03.1987. The respondent, however, did not make the appointment of the Arbitrator. Consequently the petitioner preferred Suit No.436/1988 under Section 20 of the Arbitration Act, 1940 seeking reference of the dispute to an independent arbitrator. Those proceedings were disposed of on 30.11.1999 wherein the respondent was directed to make the appointment of an Arbitrator in terms of the arbitration agreement entered into between the parties.

The respondent appointed one Bhim Sen Sharma, Assistant Director, Khadi & Village Industries Commission as the Sole Arbitrator on 01.03.2000. The petitioner was aggrieved by the said appointment on account of the alleged misconduct of the Arbitrator and preferred OMP No.53/2001 to seek the removal of the Arbitrator. The said petition was disposed of by this Court on 08.11.2005. The respondent suggested the name of Mr. N.P.Singh, General Manager, Indraprastha Power Generation Company to be the arbitrator, which was accepted by the petitioner. Consequently, Shri N.P.Singh was appointed as the Arbitrator in place of Shri Bhim Singh Sharma, the earlier arbitrator.

The learned Arbitrator, vide the impugned award, awarded an amount of Rs.1,70,000/- under Claim No.1 on account of the balance payment due under the main agreement, thereby allowing the claim in its entirety. Claim No.2 was for Rs.1,71,311.00 on account of balance payment for the additional work as per the bill submitted. This claim was allowed to the extent of Rs. 1,28,541/-. Claim No.3 made towards payment for extra work as per supplementary bill dated 15.11.1984 was rejected by the learned arbitrator. Under Claim No.4, the security deposit of Rs.20,000/- was directed to be refunded. Under Claim No.5, interest was awarded on the principal amount of Rs.3,18,541/- at the rate of 9% per annum from 19.04.1987 till the date of award. Further, interest was awarded from the date of the award in terms of Section 31(7)(b) of

the Act @ 18% p.a. on the principal amount due, till payment. The respondent was, however, granted two months time to make payment under the award and if the same had been made, no interest was to be paid after the date of the award for the said period of two months.

The respondents have preferred these objections only in respect of the award made under Claim No.1 for Rs. 1,70,000/- and the award of interest made, as aforesaid.

So far as the objection to Claim No.1 is concerned, the submission of learned counsel for the objector/respondent is that the petitioner-claimant had given a letter dated 01.02.1985 thereby agreeing to the reduction in the final bill amount from Rs. 15 lakhs to Rs.13.30 lakhs. He submits that vide letter dated 01.02.1985, the respondent had communicated that its Renovation Committee had found the work not upto the mark and had decided to impose a penalty of Rs.1.70 lakhs. The petitioner-claimant had been requested to accept the penalty imposed by the Renovation Committee in writing and to submit a detailed break-up of the bill giving measurement and quantity etc. so that the same could be verified by the Engineer appointed for the purpose. The revised bill was required to be submitted within a week from the receipt of the letter separately for the turn key and the additional work.

On the same day i.e. 01.02.1985, the petitioner had voluntarily given the following letter to the respondent :-

“We hereby accept the penalty of Rs.1,70 lacs imposed by Renovation Committee and confirm the closure of turn key job at Rs.13,30 lacs as proposed in your letter.”

Learned counsel for the respondent submits that the petitioner had accepted that it had issued the aforesaid letter, but had pleaded economic duress as the ground for execution of the aforesaid letter dated 01.02.1985. He submits that this plea has been accepted by the learned Arbitrator. The submission of learned counsel for the respondent is that the finding of the learned Arbitrator that the said communication was issued under economic duress is based on no evidence and the same is, therefore, perverse.

With regard to the award of interest, learned counsel for the respondent-objector submits that though the work was completed on 02/03.10.1984, the petitioner-claimant did not take any effective steps and did not prefer a claim till as late as the year 2001. He submits that before the earlier appointed Arbitrator, Shri Bhim Sen Sharma, the petitioner did not even file its statement of claim. The statement of claim was filed only before Shri N.P.Singh, the Arbitrator after his appointment had been made as aforesaid. He, therefore, submits that the award of interest from 1987 onwards, in any event, is not justified. He further submits that the award of interest at the rate of 18% per annum for the period after the date of the award is also excessive and cannot be sustained in view of

the Supreme Court decision in ***State of Rajasthan V. Ferro Concrete Construction (P) Ltd.***, 2009(8) SCC 753.

On the other hand the submission of Mr. Poddar, learned counsel for the petitioner is that the learned Arbitrator has returned the finding of fact with regard to the aforesaid letter being given on account of economic duress. The said finding of fact cannot be disturbed by the court while hearing objections to the award as it is not within the scope of these proceedings for this Court to re-appreciate the evidence and arrive at its own finding. In this regard he places reliance on the judgment of the Supreme Court in ***Ravindra Kumar Gupta & co. V. Union of India***, 2010 Raj 164(SC). He submits that the learned Arbitrator had found that the penalty of Rs. 1,70,000/- had been imposed by the respondent without any notice or hearing to the petitioner. The said penalty even vitiated the contractual terms. No defect was pointed by the respondent by giving a notice under clause 9(f) of the agreement which required the respondent to serve a notice to the Contractor for setting right the defects in the work. He further submits that economic duress of the petitioner was writ large inasmuch, as, the respondent was not releasing the other payments due to the petitioner including the return of the security deposit and the payment of the balance amount for the additional work as certified by the Consultant, Shri M.R. Aggarwal appointed by the respondent. In support of his plea that the Contractor is not precluded from

raising his claims due under the contract, merely on account of the submission of the no claim certificate, Mr. Poddar places reliance on the decision of the Supreme Court in **Ambica Construction V. Union of India**, V(2007) SLT 615.

So far as the grant of interest from 19.03.1987 is concerned, Mr. Poddar submits that the said date had been fixed by the Arbitrator keeping in view that on that date, the legal notice making the demand for the amount due, or in the alternative invoking the arbitration agreement, had been issued by the petitioner. He submits that despite the invocation of the arbitration agreement on 19.03.1987, the Arbitrator had not been appointed in terms of the arbitration clause by the respondent and the petitioner was driven to file Suit No.436/1988 under Section 20 of the Arbitration Act, 1940. This suit remained pending till the year 1999 when it was disposed of with a direction to the respondent to appoint an Arbitrator. He submits that after the earlier Arbitrator was appointed, on account of his alleged misconduct, the petitioner had sought his removal by filing OMP No.53/2001. This petition also remained pending till 08.11.2005 when it was finally disposed of with the appointment of the Arbitrator, Shri N.P.Singh in place of Shri Bhim Sen Sharma. Therefore, the petitioner was not responsible for the delay in filing the statement of claims. He submits that the filing of the statement of claim in the year 2001 cannot be said to be belated. Consequently, he submits, that

interest has been rightly awarded from 19.04.1987 onwards. The learned Arbitrator had granted one month's time as a reasonable time by when the respondent should have made payment of the due amount.

Having heard learned counsel and perused the award as well as the arbitral record, I am of the view that the award made by the learned Arbitrator on Claim No.1 cannot be sustained as the finding of the Arbitrator that the aforesaid letter dated 01.02.1985 was given by the petitioner under economic duress is based on no evidence at all. In fact, whatever material is placed on record goes against the finding returned by the learned Arbitrator.

On 15.10.1984, the petitioner had issued a communication to the respondent enclosing its final bill No.105 for Rs. 18,98,533/-. This bill was for the originally awarded work as well as for the additional work. The communication also recorded that the petitioner had already received Rs.13,30,000/- towards part payment. It appears that the respondent appointed an engineer one Mr. M.R. Aggarwal to make an assessment of the work done by the petitioner. Shri M.K.Aggarwal gave his report dated 02/04.01.1985. wherein he had noted that some of the items had not been provided by the petitioner contractor namely, for item No.c11, urinals 2 Nos, wc's 2 Nos and wash basins 5 Nos. Similarly for item C12, mechanical device had not been provided. He also noted that photographs had not been carried out and observed that as such

the amount to be deducted could be amicably settled with the Contractor. Shri M.R. Aggarwal also observed that:

“In general the quality of civil and wooden work, as required for such type of works is not upto the mark. The contractor could have given a better finish and performance. In this connection the contractor in the presence of your goodself has been advised by us to rectify the items as well as to improve the quality of work for the following areas:

- a) Wood, Plywood, Ply board work needs improvement by providing necessary screws/glue/lipping and hardwards.*
- b) Plaster patches on ceiling, beams, walls are to be smoothened and toothings removed, so as to render the surface even. In the mezzanic soffit, at places, the loose plaster is to be removed and fresh plaster provided.*
- c) Sliding – rolling glass shutters are to be rectified so as to slide smoothly.*
- d) The cantilevered pelmets need extra supports.*
- e) Mirror provided in the entrance lobby needs rectification.*
- f) Glazed tiles, M.S. Girder, Floor Slopes in the toilets need rectifications.*
- g) Railings on the staircase landings needs lengthening otherwise chance of the visitors tumbling are there.*
- h) Painting and polishing needs rectification at places and final costs on some of the left over areas.*
- i) The electric room needs dismantling of a wall, malba removal and provision of a ventilator for air to circulate. Proper finishing of all item in this room is necessary. Extra expenses on some of the items to be carried out in this area can be reimbursed to the contractor.*
- j) The wooden racks provided on the left are less in depth, extra depth to the tune of another 15 cm is required. This in any case is an additional items and could be got rectified before the contractor moves out of the site.*
- k) The external frontage of the building needs rectification in terms of plaster smoothening in window, covers to rolling shutters and dholpur sand stone fascia where ever*

it is bulging out or is depressed compared to the general surface level.

As the work was done in a great rush and without interruption to the sales of the commission, the curing of the cement plaster work does not seem to have taken place for a desired time. This handicap still will remain for all the patch repairs unless the areas are given clear to the contractor atleast for a week continuously."

It appears that vide another communication dated 11.01.1985, Shri M.R. Aggarwal proposed recovery of 5% from the amount under additional work, except on a few items. The recovery worked out by Mr. M. R. Aggarwal on the additional work was Rs.14,120/-. The petitioner, vide communication dated 12.01.1985 sent a revised bill for Rs.19,18,311/- which included a claim for Rs. 15 lakhs for the turn key job and a claim for Rs.4,18,311/- for the additional work. I may note that the revised bill was submitted on the basis of the report submitted by Mr. M.R. Aggarwal.

The respondent then sent the communication dated 01.02.1985 which has been referred to hereinabove. The petitioner responded to the same by issuing the communication dated 01.02.1985, which has been quoted hereinabove. Pertinently after the issuance of the communication dated 01.02.1985 by the petitioner as extracted above, the petitioner did not raise any grievance to say that the said letter had been issued under economic duress. The petitioner sent the aforesaid legal notice dated 19.03.1987 in which the petitioner demanded that out of a total amount of Rs.21,34,653.50, the respondent had made

payment of Rs.15,80,000/- only. The petitioner sought payment of the balance amount of Rs.5,54,653.50, apart from refund of the earnest money deposit of Rs.20,000/-. The petitioner also sought interest at the rate of 18% per annum on the amount of Rs.5,54,653.50 and Rs.20,000/- respectively. However, in its notice, the petitioner did not even whisper that the aforesaid communication dated 01.02.1985 had been issued under economic duress. The petitioner did not even seek to withdraw the said letter.

Mr. Poddar submits that economic duress was pleaded by the petitioner in its petition preferred under Section 20 of the Act in the year 1988. The aforesaid submission of Mr. Poddar, in my view, is of no avail. The said plea ought to have been raised at the earliest possible opportunity. The petition preferred under Section 20 of the Arbitration Act, 1940 did not even form part of the arbitral record.

The petitioner had already received payment of Rs.13,30,000/- as acknowledged in the letter dated 15.10.984. Therefore by executing the letter dated 01.02.1985 as aforesaid, there was no other economic gain that the petitioner would have received in consideration thereof. The tenor of the letter dated 0.1.02.1985 issued by the respondent also does not support the plea that the petitioner was subjected to economic duress. By this communication, the petitioner was *“requested to accept the penalty imposed by the Renovation Committee in writing”*. The petitioner

had the option whether or not to accept the said request made by the respondent. From the report of Shri M.R. Aggarwal as noticed above, it is clear that there were certain defects and the work was not found to be upto the mark. The 5% deduction suggested by him pertained only to the additional work as is evident from the letter dated 11.01.1985 issued by him. It did not pertain to the work done under the main contract. It is also pertinent to note that the defect liability period under the contract was valid for six months from 02/03.10.984 onwards. Therefore, the exercise of identification of the defects; the review of the work by the Renovation committee; the issuance of the letter dated 01.02.1985 by the respondent and the acceptance of the penalty of Rs.1,70,000/- imposed by the Renovation Committee and confirmation of closure of the turn key job at Rs.13.30 lakhs as proposed by the respondent, all took place during the currency of the defect liability period.

The arbitral tribunal has returned the finding of economic duress in the following manner:-

“The question as to what made the claimant to sign the letter dated 01.2.85 accepting the penalty imposed by Renovation Committee and confirming closing of turn key job at Rs.13.30 lacs. Payments whether received without protest or demure i.e whether issuance of such a certificate was under duress or otherwise can be ascertained from the conduct of the parties. Except signing the said letter dated 01.2.85 accepting the closing of turnkey project at the cost of Rs.13,30 lacs, the claimant has no-where conceded the said figure of “Rs.13,30 lacs for entire turnkey job. The claimant had been

repeatedly asking for payment of Rs.15 lacs for the said job as is apparent from the bills dated 15.10.84, letter dated 25.12.84, revised bill dated 12.1.85 and legal notice thereafter and further invoking of arbitration clause of Agreement.

On the other hand the respondent itself had estimated the turn key job at the cost of Rs.15 lacs and awarded the work to the Contractor at the agreed cost of Rs.15 lacs and executed Agreement to this effect. The work was regularly monitored by the appointed Consultant of the respondent till its completion. No required notice under the terms of Agreement for termination of contract or getting the defects rectified from an other Agency had been served upon the Contractor. On receipt of final Bill no defect was pointed out except that items/cost thereof etc are to be confirmed by the Manager, KGB. The respondent did not release the turn key job payment despite inaugurating the renovated Show room on 02.10.84. Even on receipt of bill dated 15.10.84, the respondent instead of clearing the payment, referred to Consultant Engineers for examination and when the Consultant Engineers vide their report dated 02.1.85 recommended for payment of entire amount of Rs.15 lacs as agreed vide Annexure "A" to the Agreement detailed under five sub-heads, the respondent again did not make the full payment of Rs.15 lacs to the claimant Contractor. The revised final bill dated 12.1.85 was also not accepted by the respondent. On the contrary the respondent wrote a letter dated 01.2.85 to the contractor to accept the penalty of Rs.1,70,000.00 on account of alleged unsatisfactory work done/work upto the mark, in writing shows the adamant attitude of respondent of not paying the full amount of awarded turn key job. The wordings of the respondent's letter "you are requested to accept the penalty imposed by the Renovation Committee in writing" itself shows the malafide intention of the respondent that the respondent wanted the Contractor to accept the payment of Rs.13.30 lacs for entire turn key job against Rs.15 lacs total Contract value and for that reason the respondent wanted a written

consent from Contractor, knowing well that under the terms of Agreement he had no authority to impose such penalty for the alleged reason, so, therefore, he wanted the claimant contractor to accept the said penalty of Rs.1,70,000.00 in writing. Had there been authorization to the respondent for imposition of penalty under the terms of Agreement, there could have been no question of asking the Contractor to accept the imposition of penalty. This conduct of the respondent reflects the ill-motives of the respondent and thereby maintained pressure on the Contractor for the release of other dues pending with the respondent in respect of additional work undertaken by him. Thus there is sufficient material on record to indicate that the authorities of respondent were bent upon denying the Contractor its just dues and implied that the Contractor had been compelled by the circumstances to submit "No Objection" without which no payments even of lawful dues were likely to be made on one pretext or the other by the respondent as is evident from the respondent's letter dated 01.2.85 itself.

I am of the opinion that under the facts and circumstances of the case it would be fair to come to the conclusion that the acceptance of penalty of Rs. 1,70,000.00 and further acceptance of Rs.13,30 lacs against Rs. 15 lacs total contract value was under duress. The plea of the respondent is unsustainable and hence rejected. I draw support from the judgment of Hon'ble Supreme Court of India in a case titled "Ambica Construction Vs. UOI" {V(2007) SLT 615}. There cannot be an absolute bar to the Contractor raising claims, which are genuine even after the submissions of such acceptance letter/No Claim Certificate. The Contractor was entitled to claim a reference under the Contract."

The reference made by the learned Arbitrator to the bills dated 15.10.1984; the letter dated 25.12.1984 and 12.01.1985, to my mind is wholly relevant inasmuch, as, all these communications

preceded the above extracted communication of the petitioner agreeing to the imposition of penalty of Rs.1,70,000/- on account of the work not being done upto the mark. The legal notice referred to by the learned Arbitrator merely raises a claim for the entire amount including Rs. 15 lakhs towards the bill for the turn key work. However, the said notice is completely silent about the letter dated 01.02.1985 issued by the petitioner. Neither it seeks to explain the circumstances in which the letter dated 01.02.1985 was issued, nor it seeks to withdraw the said letter.

The aforesaid legal notice therefore, in my view, is a document which goes against the submission of the petitioner regarding exercise of economic duress rather than support its case. The aspect that the work was regularly monitored by the appointed Consultant till its completion, or that no defect was pointed out, except that items/cost thereof were to be confirmed by the Manager, Khadi Gramodyog Bhawan, in my view, pales into insignificance in view of: the defects pointed out by Mr. M.R. Aggarwal; the defects found by the Renovation Committee; the petitioner's own communication of 01.02.1985, and; the fact that all these developments took place within the defect liability period.

The respondents had not devalued the work to be performed under the original contract from Rs.15.00 lakhs to Rs.13.30 lakhs. The respondents had, instead, valued the actual work done by the petitioner at Rs.13.30 lakhs. It is not correct to say that the

respondent had not pointed out any defects in the works of the petitioner. Apart from the report of Mr. M.R. Aggarwal, which pointed out various works, I find that the respondent had also sent a communication dated 24.10.1984 pointing out various defects in the petitioner's works. This document, though filed on record of the learned Arbitrator, has been ignored and overlooked, and a finding contrary to the evidence brought on record has been returned by him. The finding of the learned Arbitrator that "on receipt of final bill, no defect was pointed out except that items/cost thereof etc are to be confirmed by the Manager, KGB" is in the teeth of the letter dated 24.10.1984 of the respondent and the report of Mr. M.R. Aggarwal.

The learned Arbitrator notes that the respondent had no authority to levy penalty. This reasoning/finding in fact militates against the petitioner's submission that it was subjected to economic duress. If there was no legal right/authority in the respondent to levy the penalty in question, the petitioner could have stood its ground and opposed the same.

It is true that this Court while hearing objections to an award does not sit in appeal over the award. It is also true that it is not the function of the Court to re-appreciate the evidence and come to its own conclusions and findings. But, there are well recognized exceptions to the aforesaid rule. One of the recognized exceptions is where a case where the Arbitrator returns a finding of fact, which

is not premised of any evidence at all.

To enable the Arbitrator to return a finding of economic duress, it was for the petitioner to establish the same on the record, by reference to documentary evidence and/or the surrounding circumstances. In this case neither any documentary evidence was placed on record nor any other evidence was produced by the petitioner to establish the exercise of economic duress by the respondent which could have led to the petitioner issuing the communication dated 01.02.1985. On the contrary the circumstances, as I have already discussed, militate against any such finding of economic duress.

Since the petitioner had issued the communication dated 01.02.1985 accepting Rs.13,30,000/- in full and final settlement of the turn key contract as the work was not upto the mark, it was not open to the petitioner to have laid a claim for the balance amount of Rs.1,70,000. Reliance placed by the petitioner on **Ambica Construction** (supra) appears to be wholly misplaced. That was a case where the contract terms required the submission of a No Claim Certificate once the work was finally measured up. However, in that case the No Claim Certificate had been obtained even before the work had been finally measured. It was in those circumstances that the Court held that it can no longer be said that a clause in a contract (like Clause 43(2) of the GCC which was considered by the Supreme Court) would be an absolute bar to the raising of genuine

claims.

Consequently, I am of the view that the finding of economic duress returned by the Arbitrator is perverse and the same cannot be sustained. Accordingly, award on Claim No.1 is set aside.

Coming to the award of interest, I find that the petitioner had invoked the arbitration and made its claim on 19.03.1987. The appointment of the Arbitrator had to be made by the respondent. Since the Arbitrator was not appointed, the petitioner had to resort to proceedings under Section 20 of the Arbitration Act, 1940. The arbitrator was appointed by the respondent only in 1999. Soon thereafter the petitioner preferred a petition under Section 5, 8 and 11 of the Arbitration Act, 1940 for removal of the Arbitrator by alleging misconduct. The respondent chose to concede to the removal of the Arbitrator without going into the merits of the allegations made by the petitioner and, consequently, Shri N.P.Singh was appointed as the Arbitrator vide letter dated 08.11.2005. The learned Arbitrator entered upon the reference on 13.12.2005. The petitioner preferred its claim before the newly appointed Arbitrator soon thereafter.

Keeping in view the aforesaid position, it cannot be said that the petitioner had unduly delayed the filing of the statement of claim. The delay, if any, was attributable to the respondent.

It is also pertinent to note that the respondent has not disputed the award made on Claim Nos. 2 and 4 which are the only

other claims allowed by the learned Arbitrator, apart from Claim No.1 which has been set aside. There was no justification for the respondent not to have made the payment due under the said claims. Consequently the award of interest at the rate of 9% per annum from 19.04.1987 till the date of the award is perfectly valid and does not call for interference. However, in view of the decision of the Supreme Court in ***State of Rajasthan*** (supra) and considering the fact that the amount payable under claim Nos. 2 and 4 were admittedly payable, the rate of interest from the date of award stands reduced from 18% to 12% per annum. In case the payment of the amount due is made within one month from today, further interest from today, till date of payment shall not be payable. However in case the payment is not made within 30 days, further interest on the principal liability shall be payable at the rate of 15% per annum till payment or realization. The objections and the suit stand disposed of.

AUGUST 19, 2010
as

VIPIN SANGHI,J