

**HIGH COURT OF TRIPURA
AGARTALA
Arb. A. 4/2022**

The State of Tripura and anr.

----Appellant(s)

Versus

Sri Dhiraj Dhar

----Respondent(s)

For Appellant (s)	:	Mr. K. De, Addl. GA
For Respondent(s)	:	Mr. A. Sengupta, Advocate

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE ARINDAM LODH
Order**

10/01/2024

Heard learned counsel for the appellant and the respondent-Contractor.

By the impugned Order dated 20.08.2021 passed under Section 34 of the Arbitration and Conciliation Act, 1996, in C.M.(Arb) 08 of 2018, the learned District Commercial Court, West Tripura, Agartala, has upheld the arbitral award to the extent of the escalation cost of 40% over the agreement rate at the differential scheduled rate under TSR-2008 compared to TSR-2002.

Under NIT dated 09.10.2008, work was awarded in favour of the Contractor for construction of Primary Health Centre at Chachubazar under Sadar Division for an estimated cost of Rs.1,06,74,478/- to be completed within a period of 15 months from 26.02.2009 i.e. on or before 25.05.2010, but the work was completed on 20.05.2012. The differences and disputes having arisen between the parties was referred to the Sole Arbitrator. However, since the Sole Arbitrator was transferred, another Arbitrator was appointed by this Court in Arbitration Petition no. 4 of 2016.

By the impugned award, the learned Arbitrator held as under:-

"IN THE RESULT:

- 1. Respondent is directed to pay to the claimant Rs.32,56,000/- with interest @12% p.a. from December, 2014 till the date of realization.**
- 2. The respondent is directed to pay to the claimant the withheld amount of Rs.42,255/- with interest @12% p.a. from December, 2014 till the date of realization.**
- 3. The respondent is directed to refund the balance security deposit of Rs.3,57,596/- to the claimant.**
- 4. Cost on parties."**

6 (six) issues were framed for adjudication by the learned Arbitrator on the basis of the pleadings on record placed before it, which are as under:

“(i) Who is responsible for delay in completion of the work and what is the repurcation of such delay?

(ii) Whether the claimant is entitled to be compensated for the increased cost of execution for delay in completion of the work @40% extra over the agreement rate of 76% above on the value of works done during the overrun period if the cause of delay in execution is for reasons not attributable to the claimant?

(iii) Whether the claimant is entitled to get refund of the amount withheld while making payment of R/A bills namely

4th R/A Bill-	Rs.72,560/-
5th R/A Bill-	Rs.3,80,823/-
6th R/A Bill-	<u>Rs.27,387/-</u>
Total-	Rs.4,80,770/-

(iv) Whether the claimant is entitled to get refund of his balance security deposit Rs.3,57,595/-?

(v) Whether the claimant is entitled to get interest @18% p.a. w.e.f. cause of action i.e. 8.1.2014 when the respondent failed to settle the claims?

(vi) Whether the claimant is entitled to get cost of arbitration proceeding and incidental thereto and if so upto what extent?”

Though the entire arbitral award was under challenge before the learned District Commercial Court under Section 34(1) of the Act, 1996 on the ground available but during the course of argument, the challenge was confined to the escalation of 40% over the agreement rate granted by the Arbitrator in favour of the contractor.

Learned counsel for the respondent submits that an amount of Rs. 40 lakhs and odd has been paid during pendency of this appeal while the execution case is still pending.

The respondents had in their written statement relied upon Clause 44 and 44.1 of the Agreement, which though has been referred to by the learned Arbitrator in the impugned award, but in a truncated form.

While dealing with issue no. (I) at page 10 of the award, the learned Arbitrator held as under:

“.....The respondent stated in its objection dated 18-3-2017 submitted against the breakup of the compensation filed by the claimant that Clauses 44 and 44.1 of the agreement are applicable to (i) where the estimated value of the work is more than Rs. 1 crore, (ii) stipulated period for completion of the work under contract is more than 24 months and (iii) delay in the completion of work should be attributable to the department only, but in the present case the completion period is 15 months, less than 24 months and as such conditions laid down in the aforesaid clauses are not applicable to the present case.

In view of the above factual portion the case in hand may be decided on the principle of justice, equity and good conscience.

The claimant stated in his letter dated 24-1-2011 addressed to the Executive Engineer, Mohanpur Division, PWD (R & B), Mohanpur, West Tripura annexed to the claim petition that as per agreement, work was stipulated to be completed within 25-5-2010, there being breach of contract committed by the department by making inordinate delay in furnishing modified drawing for the major part of the work after expansion joint, the work could not be completed within the stipulated period of 25-5-2010. It is further stated in the said letter that in his letter dated 1-2-2010 matter was brought to the notice of the Executive Engineer and applied for granting extension of time upto 9-1-2011 mentioning the delay in work. Third RA bill was prepared on 22-3-2010 for an amount of Rs. 38,59,709/- but payment was released in fragmentation adversely affecting the progress of the work. That apart while preparing the said R/A bill measurements for the work was done for valuation of about 3 lacs were left out. The 4th R/A bill was prepared on 11-10-2010 for an amount of Rs. 23,84,930/-, but in the said bill the earlier left out measurements while preparing 3rd R/A bill were again left out. Out of the bill amount of Rs. 23,84,930/-, part payment for an amount of Rs. 15 lacs was released on 13-10-2010 and the cheque issued was encashed in the bank account of the claimant. Further payment was released on 27-12-2010 for Rs. 4 lacs, but the cheque issued for Rs. 3,31,760/- was not encashed and deposited in the bank account of the claimant. It is further stated in the said letter that without getting payment for the up-to-date work done, it became practically impossible on the part of the claimant to go ahead with further work and the claimant claimed escalated rate for execution of the work by granting 40% extra over the agreement rate of 76%.

In response to the aforesaid letter, Executive Engineer informed the claimant by a letter No. F.13(213)/ EE/ MNP/ PWD/1326-27 dated 22-6-2011 annexed to the claim petition that provisional extension of time for the completion of the work was granted without prejudice to the provision of Clause 2 of the said agreement. According to R/A bill all payment was made in due course as per provision of the agreement. In the agreement there is no scope for escalated rate over the agreement rate. Hence, escalated rate will not be entertained, but in the said letter Executive Engineer did not deny the allegations made by the claimant in the matter of delay in execution of the work.

In para 11 of the counter statement of fact respondent stated that:

Without prejudice to any action under Clause 46 of the Contract the respondent had extended the time provisionally beyond the stipulated date of completion (25-5-2010) upto 31-3-2011 followed by further extension upto 31-7-2011, 31-10-2011 and 31-12-2011 and so on. The contractor applied for once only seeking extension but considering the exigency of the work, the respondent acted accordingly.

For public interest the respondent granted extension of time suo moto repeatedly whereas the claimant applied for once only and as such it may safely be presumed that extension was necessary for whatsoever reasons.

Copies of extension orders are annexed to the counter statement of fact, on perusal it appears that first extension was granted upto 31-3-2011 by a letter No. F.15(13)/EE/MNP/7434-39 dated 14-2-2011.

Second extension was granted upto 31-7-2011 by a letter No. F.15(13)/EE/ MNP/ 1258-62 dated 21-6-2011.

Third extension was granted upto 31-10-2011 by a letter No. F.15(13)/EE/MNP/2136-40 dated 21-7-2011 and 4th extension was granted upto 31-12-2011 by a letter No. F.15(13)/EE/MNP/3512-16 dated 27-10-2011 and extension was granted subject to Clause 2 of the Agreement.

Clause 2 of the agreement lays down that:

"Except where otherwise specifically stated, the Engineer - in- Charge will decide the contractual matters between the department and the contractor in the role representing the department."

And the Clause 2 has no nexus with the extension of time.

At the same time respondent stated in its objection dated 18-3-2017 filed against the break up filed by the claimant that Clause 44 and 44(1) of the agreement are not applicable to the present case and as such it is clear that the extension was granted unconditionally.

In view of the above factual position it may safely be presumed that extension was necessary for whatsoever reason and the delay in the execution of work is not attributable to the claimant's fault.

And as such the claimant is entitled to escalated value of the work executed during the extended period.

The Issue No. I is decided accordingly.”

In respect of issue no. (II) relating to entitlement of the claimant to be compensated for the increased cost of execution for delay in completion of the work @40% extra over the agreement rate of 76% above on the value of the works done during the overrun period, if the delay for reasons is not attributable to the claimant, it was held as under:

“..... Regarding price adjustment respondent stated in its objection dated 18.3.2017 that Clauses 44 and 44.1 of the agreement are not applicable to the present case, but the principle thereof may be applied in the present case on the principle of justice, equity and good conscience.

In view of the above factual position the claimant is entitled to be compensated with the increased cost of execution for delay in completing the work @40% extra over the agreement rate of 76% above on the value of the works done during the overrun period which is quantified at Rs.32,56,000/- and the Issue No. (II) is decided in the affirmative.”

The relevant Clause 44 and 44.1 have been placed before us from the paper book and are also extracted hereunder:

“Clause 44:

Price adjustment (not applicable for works for which estimated cost put to tender is less than Rs.1 crore and stipulated time for completion is less than or equal to 24 months).”

“Clause 44.1:

Price adjustment shall be granted where administered prices are enforced and that too for works estimated at more than Rs. 1 crore and having completion period of more than 24 (twenty four) months. This should be applicable within the original contract period or extended period owing to departmental delay. This will not apply to cases attributed to contractors’ fault.

a) The cost of materials and electrical energy supplied by the Department if any at fixed prices shall be excluded from the scope of price adjustment.

b) The price adjustment shall apply for the work done from the Start date to end of the intended completion date or extensions granted by the Engineer-in-Charge and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the contractor.

If the prices of material (not being materials supplied or services rendered at fixed prices by the department) and/or wages of labour required for execution of work increases, 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 compensation for escalation in prices shall be available only for the works done within the stipulated period of completion as per contract and for works done beyond the stipulated period of completion as per contract the compensation for escalation in prices should be restricted to the escalation occurred upto the stipulated date of completion and also the compensation for escalation in prices shall be available for works for which the stipulated period of completion is more than 24 (twenty four) months. No compensation for escalation will be allowed for works where stipulated time for completion is 24 (twenty four) months or less even if the completion of works is extended beyond stipulated date of completion for any reason..... ”

The learned District Commercial Court, however, has dealt with this issue in a cryptic manner, as under:

“Though there are several grounds enumerated in the application for setting aside the award but during oral argument learned Advocate for the petitioner has confined his argument on the provisions of clause (iv) of sub-section 2 of Section 34 of the Act contending, inter alia, that the increased cost to the extent of 40% over the agreement rate of Rs.76% so granted by the sole arbitrator was beyond the agreement and cannot stand and as such liable to be set aside. Learned advocate for the petitioner has referred the judgment of Hon’ble Supreme Court reported in (2008) 13 SCC 80 (DDA VS R.S. Sharma).

Learned Advocate for the respondent has made extensive submission and thereby defended the award. Learned advocate has also referred the judgment of Hon’ble Supreme Court reported in AIR 1989 SC 1034 (PM Paul VS Union of India) and another judgment reported in AIR 1985 SC 607 (Hyderabad Municipal Corporation VS M. Krishnaswami Mudaliar).

The proceeding u/s 34 of the Act are summary in nature. The scope of enquiry in such proceedings is restricted to a consideration whether any of the grounds as enumerated in Section 34(2) or Section 13(5) or Section 16(6) are made out to set aside the award. The grounds for setting aside are, therefore, appears to be specific.

With a view to address the issue so raised by learned Advocate for the petitioner during argument we have gone through the finding arrived at by the sole arbitrator while deciding the Issue No.2. The sole arbitrator while deciding the issue has taken cognizance of the matter that the tender dated 10.09.2008 was published based on TSR 2008 and the scheduled rate of TSR 2008 is more than 116% of the scheduled rate of TSR 2002 and taking into account such increased ratio has applied the principles of justice, equity and good conscience.

Regard being had to the entire facts and circumstances with particular reference to the findings arrived at by the sole arbitrator it cannot be said that the sole arbitrator has acted beyond his jurisdiction.

In view of the above I am of the considered opinion that the application under consideration has no merit and accordingly stands rejected.”

[emphasis supplied]

Though an Arbitrator is the Sole Judge for construction of the terms and conditions of the Agreement, but in this case, we find that the learned Arbitrator has not taken into consideration the entire Clause 44.1 of the Agreement, which also stipulates that “*no compensation for escalation will be allowed for works where stipulated time for completion is 24 (twenty four) months or less even if the completion of works is extended beyond stipulated date of completion for any reason.*”

The learned District Commercial Court has failed to test the correctness of the award within the contours of the grounds available under Section 34(1) and (2) of the Act of 1996 without referring to the relevant Clauses of the Agreement which apply to the determination of the Issue No. (II) at hand.

Since the impugned order suffers from non-application of mind and failure to exercise jurisdiction in terms of Section 34(1) and (2) of the Act of 1996, we are, therefore, inclined to remit the matter to the learned District

Commercial Court, West Tripura, Agartala, to decide the issue regarding the price escalation or adjustment in accordance with law within a reasonable time preferably 3 months from the date of receipt of the certified copy of this order since the Arbitration proceeding was initiated way back in the year 2014.

The appeal is allowed in the manner and to the extent as indicated above.

(ARINDAM LODH),J

(APARESH KUMAR SINGH), CJ



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