

IN THE COURT OF DISTRICT & SESSIONS JUDGE, KAMRUP, GUWAHATI

Present :- Dr. (Mrs) I. Shah

Misc. (Arb) Case No. 577 of 2009

Petitioner : Union of India,
Represented by the Executive Engineer,
Guwahati Central Division, CPWD,
Guwahati-781021

-Vs-

Respondents : 1. Sri Kangan Dutta
S/o Late Parsuram Dutta
Sole proprietor of M/S Oriental
Entineers, R.G. baruah Road,
Op. Ambika Service Station,
1st Floor Trishant, Guwahati-24

2. Justice Dinendra Biswas (Retd.),
Sole Arbitrator, Saktigarh, near
Central Bank, G.S. Road, Guwahati

Date of Argument on : 20-08-2011

Date of Judgment on : 06-09-2011

ADVOCATES

1. For the Petitioner : (1) Mr. C. Baruah

2. For the Respondents : (1) M/S G. Sutradhar

J U D G M E N T

This application U/S 34 of Arbitration and Conciliation Act has been filed against the Award dated 24-08-2009 passed by the Hon'ble Justice Dharendra Biswas (Retd.) Sole Arbitrator

The petitioner Union Of India represented by the Executive Engineer, Guwahati Central Division, CPWD has preferred this petition. The O/P Sri Khagen Dutta the proprietor of M/S Oriental Engineers. There was an agreements between the petitioners and the O/P and as per the agreement, the O/P entered into a contract with the petitioners for construction of a Multipurpose Hall including Internal Water Supply Systems and Sanitary Installations for the Sports Authority of India at Guwahati at a costs of Rs. 1,42,48579/-. The tender of the claimant was accepted on 26-12-2002. As per the agreement, the respondent had to complete the works within 12 months from 03-01-2003 to 02-01-2004. On receipt of the work order the respondent mobilized only resources including man and machineries to complete the project within the stipulated period of 12 months.

The respondent in his petition before the arbitration alleged that the petitioners delayed in the furnishing of necessary drawings from the very beginning. That of art the want of approach road to the work side construction materials could not be carried by trucks during the period between 10-01-2003 and 21-02-2003. The progress work was hampered due to non-furnishing of other collateral drawings within time. Although the respondent issued several remainders to furnishing necessary drawings within time but the petitioners failed to furnish the drawings

compelling the claimants respondents to stop work from time to time. All the men and the machineries mobilized by the claimants at the work side remain idle during the period between 07-04-2003 to 26-04-2003 and 07-05-2003 to 19-08-2003. The claimant therefore claimed compensation for loss sustained on account of no work during those periods. But the petitioners turned down the claim for the compensation and informed the claimant that structural drawings of trusses were under process. In spite of repeated reminders the petitioners failed to finalize and furnish the essential drawings within reasonable time delaying the progress of work. It is alleged that the failure on part of the petitioner to fulfill their obligation frustrated the entire working programme. The petitioners took almost 11 months time for furnishing the drawing whereas the work was to be completed within 12 months period. In the course of time, the prices of steel and steel related products, MS Pipe and other building materials increased unreasonably to the extent of 60% to 70%. For approval of drawings and due to price rise the claimant could not place orders for suppliers for construction materials. However, the respondents unilaterally granted provisional extensions of time for completion of the work till 31-12-2004 vide letter dated 08-10-2004 which was extended to 30-06-2005. The claimant could not complete the work as the rates of materials were not reconsidered. Show cause notice to the claimant was issued and on response to the show cause notice the claimant asserted the demands for enhancement of rates. The petitioners threatened to invoke the provision of Clause 3 A, B and C of the agreement. Again the claimant requested the respondents to grant extensions for a period of 90 days and demand payment of Rs.51,00,000/- being additional costs incurred on account of

unprecedented increase in prices of materials. The petitioners herein issued another show cause notice and in reply the claimant expressed the desire to execute the work subject to consider of that prayers communicated for vide earlier letter. The petitioners insisted for execution of work but they did not address the problems faced by the claimant. Thereafter the claimant issued a notice through his lawyers on 19-03-2005 or referring the dispute to arbitrations but the respondents declined to refer the dispute for arbitrators and re-signed the contract forfeited security deposit vide letter dated 10-06-2005. In the petition before the arbitrator the claimant pleaded that the petitioners are committed breach of contract for which they are liable to compensate the losses as below :

1. Rs.31,20,000/- for the loss suffered by the claimant company during the spell of ideal periods when the men and machineries could not do any work.
2. Rs.6,59,150/- due to escalation of prices of cement.
3. Rs.12,71,725/- on accounts of increase in rates of steel and steel related orders.
4. Rs.11, 89,036/- as a value of work done.
5. Rs.11,24,840/- as a loss of profit on left over one.
6. Rs.50,00,000/- by way of refund of security deposit
7. Interest at a rate of 18% and
8. Cost of arbitration and any other relief

The petitioners in their objections and counter-claim denied the allegations and pleaded that the drawings were handed over to the claimant on 04-02-2003 and other connected drawings were also provided within time to get

the work completed within the time framed. They denied that the claimant made arrangement and mobilized men materials within time to start the work within stipulated period. It is averred that the drawings for bims/slams and the walk way slabs were already made available and despite that the progress of work was not satisfactory. They requested the claimants to increase the man powers to expedite the work. According to petitioners, an approached road to the work side from the rear gate was already there and no claim for this reason is maintainable in view of this specific conditions entertained in the notice. According to them, the claimant despite receipt of structural drawings for slabs/bim etc. almost took 56 days in casting the front parabolas and canopy slabs. They, however, admitted that the formal drawings for fabrication of roof truss were handed over in the months of December, 2003, but the advanced copies thereafter given much earlier with a view to enable the claimant to procure pipes and other materials will ahead of time. But the claimant brought pipes to the side belatedly and this reason takes in delay in the execution of work. According to them, during the period between 07-04-2003 to 26-04-2003 and from 07-05-2003 to 19-08-2003 the works progressed as usual which is evident from the fact that the claimant during the said periods utilized cements bags. The petitioners also repudiated the claim on account of escalation of price on the ground that the delay in construction work was on the fault of the claimant only. They averred that they already extended the time till 31-03-2005 in response to the request of the claimant vide his letter dated 17-12-2004 without prejudice to the right of action under the clauses of agreement. The claim of the claimant for escalation of the prices and the loss suffered during the ideal period was

rightly rejected and it was duly communicated to claimant. It was also made clear by the petitioner that the claimant was interested to complete the work if the claimant towards to complete the work they should start the work immediately. For fault of the claimant the contract had to be terminate and the remaining work was completed through other agency after calling tender in prescribed manner by incurring additional expenditure to the tune of Rs. 24,00,000/-. The petitioners also claimed that they spend an amount of Rs.3,00,000/- for engagement of extra skill men power of engineers, clerks etc. In this away the petitioners claimed a sum of Rs.49,25,000/- along with interest @ 18% in their counter claim.

The claimant filed written objection against the counter claim reiterated the grounds related in the claim petition.

On the basis of pleadings and after hearing both sides learned arbitrator framed the following issues :

1. Whether the respondents committed fundamental breach of contract as they failed to give drawings in time ?
2. Whether the work was suspended from 07-04-2003 to 26-04-2003 and from 07-05-2003 to 19-08-2003 for want of drawings ?
3. Whether time was essence of the contract ?
4. Whether the respondents are responsible for frustration of contract ?
5. Whether the contract was frustrated due to abnormal increase in prices ?

6. Whether the claimant is responsible for breach of contract and whether the termination of contract by the respondents has been in accordance with law ?
7. Whether the claimant is under an obligation to pay any amount under the provisions of Clauses 2 and 3 of the agreement and whether the claimant is entitled to get all the claims as claimed by him and whether the respondents are entitled to the reliefs or any of the reliefs claimed by them in their counter claim ?
8. What other relief/reliefs the claimant is entitled for ?

The award passed by the learned arbitrator has been challenged that the award of the arbitrator is in perverse on the evidence on records. The learned arbitrators finding that in absence of approved drawings it was also not possible for the contractor to jump out the working programme for completion of the work within the stipulated period of 12 months.

The findings of Issue No.2 is beyond the evidence adduced by the parties. It is submitted that the cement registrar produced before the arbitrators gives a different picture. The findings are therefore unreasonable. The learned arbitrator without consultation of records referred in the argument passed the award on the basis of pleadings. The arbitrator deliberately averred that the records to arrived at the motivate findings. The award of compensation at the rate of 25% of the value of work is also illegal and unreasonable. There was no suspension of work and the utilization of cement during the period proves that there was no suspension of work therefore the arbitrator has mis-conducted by not considering the materials on records in

decision of the issue and in awarding 25% of value of the work. The findings of the learned arbitrator is perverse. It is further submitted that as per clause 25 (1) of the agreement the claimant has to raised the dispute within 15 days when his claim was rejected by the engineer. The claim of the claimant was rejected on 30-03-2005 but the claimant failed to raised dispute for proceed further for remedy as per the procedure of the contract. Therefore, after expiry of the said period no dispute was referable to the arbitrator. The arbitrator, as per the contract, had no jurisdiction to settled the dispute after the expiry of the period. It is further submitted that time was essenced of the contract. It was not a case that the engineer extended the time of his own. At the time of each and every extension it was provisional and there was stipulation that time is essence of the contract and same shall continue since the extension had to be granted provisionally for the purpose of completion of the work within limited time. The learned arbitrator erroneously took shelter and wrongly interpreted the judgment of the apex court reported in AIR 1979 SC 720. The contractor even after due notice failed to complete the work within time and in spite of repeated calls about slow progress of work he could not complete the work. Hence, the engineer-in-charge after giving sufficient times had to invoke the clause 3(A) of the agreement for recining the contract with the implication of fees and cost the decision in adjudication of issues are illegal and liable to be set aside. The learned arbitrator also failed to consult the agreement while passing the award. The claim No.4 of the claimant was beyond the contract.

It is well settled law that the Civil Court examining the validity of an arbitral award U/S 34 of the Act, exercise a

supervise and or appellate jurisdiction over the award of an arbitral tribunal. A court can set aside an arbitral award only any of the ground mentioned in Section 34(2)(a) (1 to 5) or Sec. 34(2)(b) (1) and (2) are made out.

In the case of Madhya Pradesh Housing Board -Vs- progressive Writer and publishers (2009) 5 SCC 678 in para 29 of the judgment has observed that "Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. This court in one of its latest decisions stated that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding U/S 30 of the Arbitration Act. this court in Arosan Enterprise categorically stated that in the event of there being no reason in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, interference would still be not available unless of course, there exist a total perversity in the award or the judgment is based on the wrong proposition of law. This court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view. The observations of Lord Dunedin in Champsey Bhara stand accepted and adopted by this court in Bungo Steel Furniture to the effect that the court had no jurisdiction to investigate in to the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the arbitrator has committed and error of law. The court as a matter of fact, ca not substitute its own evaluation and come to the conclusion that the

arbitrator had acted contrary to the bargain between the parties.

Interpretation of a contract, it is trite, is a matter for the arbitrator to determine. Even in a case where the award contained reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or award is based on wrong proposition of law".

In the case of G. Ramachandra Reddy and Co. -Vs- Union f India & another (2009) 6 SCC 414 in para 19 the Hon'ble Apex Court has observed "We may, at the outset, notice the legal principles governing the dispute between the parties. Interpretation of a contract may fall within the realm of the arbitrator. The court while dealing with an award would not re-appreciate the evidence. An award containing reasons also may not be interfered with unless they are found to be perverse or based on a wrong proposition of law. If two views are possible, it is trite, the court will refrain itself from interfering".

In the cited case of Arosan Enterprises -Vs- Union of India (1999) 9 SCC 449 in para 39 of the judgment it is hold that "In any event, the issues raised in the matter on merits relate to default, time being the essence, quantum of damages- these are all issues of fact, and he arbitrators are within their jurisdiction to decide the issue as the deem it fit-the courts have no right or authority to interdict an award on a factual issue and it is on this scope the appellate court has gone totally wrong and thus exercised jurisdiction which it did not have. The exercise of jurisdiction it thus wholly unwarranted and the high court has thus exceeded its jurisdiction warranting interference by this court. As

regards issue of fact as noticed above and the observations made hereinabove obtains support from a judgment of this court in the case of Olympus Superstructures (P) Ltd. V. Meena Vijay Khetan”.

In the cited case of M/S Hind Construction Contractors by its Sole proprietor Bhikam Chand Mulchand Jain (Dead) By LRs -Vs- State of Maharashtra (1979) 2 SCC 70 in para of the judgment has observed that “it will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment for fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasizes portion of the aforesaid statement of law is based on Lamprell V. Billericay union Web V. Hughes and Charles Rickards Lrd. V. Oppenheim.

In the case of M/S Sudarsan Trading Co. -Vs- Govt. of Kerala and Another (1998) 2 SCC 38 it was observed that the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decision, the arbitrator had acted correctly or incorrectly. The Hon’ble Supreme court held that the court had no

jurisdiction to do namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the arbitrator. By purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. It has to be determined that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. The decision of the arbitrator on certain amounts awarded is a possible to correct, the award examining by the court.

It appears from the record of Arbitral Proceeding that the contract was extended by the petitioner up to 31-12-2004. The respondent sought for revision of the terms of contract vide letter dated 13-05-2004, 26-05-2004 and 31-05-2004. But the petitioner failed to give any reply. Thereafter, respondent issued notice calling the petitioner to refer the dispute to arbitration. The petitioner did not answer the notice within the statutory period of 30 days and then the respondent filed an application U/S 11(6) of the Act before Hon'ble Chief Justice, Guwahati High Court and as per order of Hon'ble Chief Justice Arbitrator was appointed. Therefore, contention of petition that dispute ought to have been raised within 15 days when the claim was rejected and no dispute was referable to the arbitrator is not true.

In the award learned arbitrator has discussed each claims referred to him. The particular amounts against each claim payable to respond is a decision within the competency the arbitrator and in view of cited ratios laid by Hon'ble Apex Court, this court has not jurisdiction to interfere with the findings of arbitrator. Learned arbitrator has considered that although as per the agreement the work was to be completed within 12 months. But the respondent (Petitioner herein) failed to furnish the necessary drawings for which there was delay. It is settled law that even where the parties have expressively provided that time is of the essence of the contract such stipulation will have to be read along with other provision of the contract. Here in this case the time was extended by the petitioner and now the petitioner can not turn around and say that time was essence of the contract. By supporting to construe the contract the court can not take upon the burden of saying that this was contrary to contract and as such beyond jurisdiction. The decision of arbitrator on certain amounts awarded in a possible view and there is nothing to say that it is not a correct view. The award in this way can not be examined by the court. The learned arbitrator has passed award after discussing every aspect and reason therefore. In view of the above, the prayer of petition U/S 34 of the act is rejected. This case is accordingly disposed of.

Given under my hand and seal of this court on this 6th day of September, 2011.

Dictated and corrected by me

District Judge,
Kamrup, Guwahati

District Judge,
Kamrup, Guwahati