

RAJASTHAN HIGH COURT

Pioneer Construction

Vs.

State of Rajasthan

Arbitration Appln. No. 04 of 2003

(Mrs. Gyan Sudha Misra, J.)

27.04.2005

ORDER

Mrs. Gyan Sudha Misra, J.

1. The applicant M/s. Pioneer Construction has filed this application for appointment of an arbitrator in regard to a dispute which he has raised claiming additional amount on account of price escalation of the materials which he had used in construction of the quarters to be used as residence by the Judicial Officers.
2. To appreciate the controversy it may be noticed that a contract was awarded to the applicant in the year 1995 for construction of residential accommodation for judicial officers by the Public Works Department of the Government of Rajasthan which was to be completed by 23-4-1996. But the petitioner executed the contract finally in the year 1998 for which the entire payment also was made to the applicant in the year 1998 itself. The applicant however had a late realization in the year 2001 when it struck him that he could claim additional payment in regard to the contract which he had executed in the year 1998 towards price escalation taking the advantage of an order for increase in petroleum products and therefore, he filed an application after five years of acceptance of final payment in the year 2003 for appointment of an arbitrator in regard to additional claim of payment towards price escalation of petroleum products which he had used in construction of the residential premises.
3. While filing an application for appointment of an arbitrator the applicant and his counsel have totally ignored the agreement which had been executed between the applicant and the respondent-State in regard to execution of the contract as admittedly

the clause regarding price escalation had been specifically deleted in the agreement to which the applicant had agreed by signing the agreement. It is therefore, relevant to quote Clause 45 of the agreement which lays down as follows:

"Clause 45. If, during the progress of the contract of value exceeding Rs. 10.00 lac (accepted tendered amount minus cost of material supplied by the department), and where stipulated completion period is more than 12 months (both the conditions should be fulfilled) the price, of any materials/bitumen/diesel and petrol incorporated in the works (not being materials supplied by the Department) and/or wages of labor increase or decreases, as compared to the price and/or wages prevailing at the date of opening of tender or date of negotiations for the work, the amount payable to contractors for the work shall be adjusted for increase or decrease in the rates of materials (excepting those materials supplied by the Department/labor/bitumen diesel and petrol. If negotiated rates have been accepted, prices as on the date of negotiation shall be considered for price adjustment. Similarly, if rates received on the date of opening of tenders have been accepted, then prices on the date of opening of tender shall be considered for price adjustment."

4. It is crystal clear from the perusal of the aforesaid clause that the applicant had clearly agreed that although the increase or decrease of the price regarding cost of material had to be adjusted, prices as on the date of negotiation had to prevail for price adjustment or the prices on the date of opening of tender had to be considered for price adjustment. That perhaps was the reason that applicant never raised the dispute regarding price escalation right from 1998 upto the year 2003. Hence, if the cost of petroleum product increased after execution of the contract that clearly could not be a reason for the applicant-contractor or raise a dispute claiming payment towards price escalation as that obviously could not have been applied with retrospective effect in violation of the specific clause in the agreement so as to give a cause to the applicant-contractor to raise a dispute in this regard although as per the contention of the counsel for the applicant, this is also a dispute which should be referred to the arbitrator for adjudication.

5. It is no doubt true that if a *bona fide* dispute arises between the parties in regard to a contract which had been executed by virtue of a duly signed agreement, the same has to be referred to the arbitrator if a specific clause to that effect or by implication is

existing, but when such a clause is absolutely missing in the agreement, that cannot be made a subject-matter of dispute for appointment of an arbitrator as it has happened in this case. In the instant matter a specific clause bearing No. 45 culminating into an agreement had been executed that the contractor will be allowed to claim price adjustment as per the price prevailing on the date of the negotiation or the prices on the date of opening the tender and there is no clause in the agreement claiming amount towards price escalation in future after execution of the contract and therefore if there has been any increase in the petroleum product at a subsequent stage, it cannot be said that the dispute is of such a nature which has arisen in course of an execution of the contract so as to refer the same to an arbitrator for adjudication.

6. It has to be emphasized that existence of a dispute for appointment of an arbitrator is a legal ingredient in terms of the Arbitration and Conciliation Act of 1996 and even prior to it, but this dispute cannot be treated in isolation beyond the terms of the contract which had been executed between the parties and it cannot be stretched to the extent contrary to the agreement and terms of the contract. Hence, if there has been increase in the cost of any material in the market, the contractor cannot be allowed to raise a dispute in contravention of the specific clause in the work-contract itself laying down clearly to what extent the dispute regarding price escalation could be raised specifying the cut-off date in this regard. This being the position, I find complete absence of dispute between the parties relating to the claim of payment in regard to price escalation of the diesel after the date of negotiation and opening of tender.

7. Besides this, it is also to be taken note of that the applicant had filed the application in the year 2005 for price escalation after more than five years of the full and final settlement of the claim in the year 1998. Thus, in addition to the fact that there is absence of a clause for raising any dispute in regard to the price escalation of a material after opening of the tender and the applicant having accepted the full and final payment surrendering his right to raise any dispute in future regarding the claim of any payment including any payment regarding escalation, the plea of the applicant for appointment of an arbitrator in absence of a *bona fide* dispute cannot be entertained.

8. Consequently, this application stands rejected.

Application dismissed.