HIGH COURT OF DELHI

UNION OF INDIA
V/S
CHENAB CONSTRUCTION JOINT VENTURE

Date of Decision: 05 March 2010

Citation: 2010 LawSuit(Del) 2452

Hon'ble Judges: Valmiki J Mehta

Case Type: O M P

Case No: 44 of 2010

Subject: Arbitration, Civil

Acts Referred:
Arbitration and Conciliation Act, 1996 Sec 34, Sec 31(7)

Final Decision: Petition dismissed

Eq. Citations: 2010 (4) ILR(Del) 163

Advocates: Amit Gupta, Jagjit Singh, Navin Chawla

Reference Cases:
Cases Referred in (+): **3**

Judgement Text:-

Valmiki J Mehta, J

[1] This petition under Section 34 of the Arbitration & Conciliation Act, 1996 challenges

the Award of the three member Arbitral Tribunal comprising of the Chief Engineer of the Northern Railway, FA & CAO (Traffic) Northern Railway and the Group General Manager of the Delhi Metro Railway Corporation (Presiding Arbitrator), an officer who is said to be on deputation from the Railways to the DMRC.

[2] The counsel for the petitioner has only pressed his objections with regard to Claim Nos. 6, 9, 10, 26 and 8, additional Claim No. 1, additional Claim No. 6 and the award of interest as adjudicated in the Award.

[3] The scope for hearing of a petition under Section 34 is now well settled. A court would interfere with the Award only if the same is illegal or violative of the contractual provisions or the findings are so perverse that it shocks the judicial conscience. Keeping in view the aforesaid parameters, I have examined the contentions as raised by the counsel for the petitioner.

[4] Claim No. 6 was the claim of the respondent/claimant for expenses incurred for digging foundation below prescribed level as shown in the tender document. The Arbitrators have found as a matter of fact that there was a deviation of the work and the contractor has in fact executed work beyond the specified quantities of the contract. The Arbitrators, therefore, came to a finding that though 66 metres were measured and recorded as the work done, payment was only made for part quantity of 30 metres. Claim No. 6 has accordingly been allowed by the Arbitrators for payment for the work done up to 66 metres. The conclusions of the Arbitrators are contained in the following paragraph and with which I agree.

> The Claimants referred page 4 of agreement and argued that there is provision in the contract that in case digging of foundation was less, recovery would accordingly be made and if it is more, additional quantity shall be paid at agreement rates. In the course of execution, foundation were got dug deeper than specified depth as such Respondents recorded measurements but have not paid full quantity of 66 meters as measured and recorded by them. In running bill, Respondents released payment for part Quantity of 30 meters instead of 66 meters as actually executed by Claimants at site. On verification of records of Respondents, such as designs, measurements recorded by them and other relevant records, it was seen by Arbitration Tribunal that the Respondents had measured 52.136 meters in piers and 0.637 meters in abutment, and had released in running bill quantity of 28.876 meters in piers and 0.509 meters in abutments, hence payment for balance

quantity of 52.136 - 28.976 = 23.160 meters in piers and quantity of 0.637 - 0.509 = balance 0.128 meters in abutment @ agreement rates i.e. Rs. 60,000/- per m for piers and Rs. 80,000/- per meter for abutment i.e. 23.16 x 60000 = Rs. 13,89,600 and 0.128 x 80000 = Rs. 10240 = Rs. 13,99,840/- is awarded to the Claimants.

[5] Claim No. 9 was the claim of the respondent herein for payment of compaction of earth filling carried out under Item No. 8. The Arbitrators have recorded a finding of fact that there was an agreed rate between the parties of Rs. 8.08 per m3. In spite of the Agreement, the petitioner sought to unilaterally revise and reduce this rate to Rs. 5.40 per m3 and which has therefore not been accepted by the Arbitrators. This finding of the Arbitrators is therefore clearly justified because once there is an agreed rate, there cannot be unilateral alteration of the same to the detriment of the other party.

[6] Claim No. 10 was the claim of the respondent for expenses incurred for providing/fixing and installing bridge bearings with complete accessories. Under this claim, the Arbitrators have noted that though under the tender document, either of the two bearings viz. Elastomeric Neoprene Bearings or POT/PTFE bearings, could have been supplied by the contractor. The contractor therefore submitted his tender with respect to supply of Neoprene Bearings and accordingly priced his tender. The petitioner after accepting the tender unilaterally required, the respondent to put, not Neoprene Bearings but POT/PTFE bearings. Since this would be an amendment to the contract and since the POT/PTFE bearings were of a higher cost instead of the tendered Neoprene bearings, the Arbitrators have granted the claim for the higher cost of POT/PTEE bearings. No fault therefore can also be found with respect to this finding and conclusion of the Arbitration Tribunal.

[7] Claim No. 26 and 8 have been dealt with by the Arbitral Tribunal together because they pertained to the issue of price variation. The Arbitrators have exhaustively and faithfully recorded the respective submissions of the parties and after discussing the matter have given their conclusions for awarding the amount. Since the Arbitration Tribunal has with clarity recorded the submissions, findings and the conclusions, it would be appropriate if I simply reproduce the same and which read as under:

> The Arbitration Tribunal has considered and examined various contentions, written submissions, record etc. as filed and relied upon by parties. The crux of Respondents arguments is that there was slow progress on part of Claimants, as such extension was granted upto 7.08.1999 with PVC, and

thereafter extensions were sanctioned without levy of penalty/Liquidated Damages and without benefit of Price Variation Clause. The averments of claimants such as non availability of land, which remained under occupation of security personal, non availability of land for casting yards, changes in GADS, changes in design of pier, delays in approval of design and drawing by Proof Consultants and the Department, delay in construction of catch water drains, delays due to diversion of National Highway, delays in power connections delays due to shortage in Departmental Supplies, delays in payments, wrong encashment of BGs, delays due to rains, strikes and Law and Order situation in J & K., non finalization of NS items etc. and Respondents replies to Claimants and instructions to increase progress etc. have been examined. The Arbitration Tribunal has carefully considered the merits and demerits including conditions of contract, documents records etc. It is also seen that the work which was slated for completion on 07.02.1998 finally was completed on 31.07.2004 i.e. with additional period of 77 months, part of which was extended by Respondent with grant of escalation and rest of period without penalty, without escalation, though tenders for additional pier P1 were finally decided by Respondent on 25.04.2003, the Respondents could not throw light on the aspect of calling tenders in April, 2003 for this additional pier when in the meeting held on 19.8.1996 the respondents were aware that additional pier had to be provided and till it was completed claimants work of viaduct E-18, would have remained incomplete. The respondent, got additional Pier-I satisfactorily completed on 15.06.2004 which proves that Claimants contractual date for items to be completed after completion of additional pier had to be reasonably and proportionately extended. The balance items executed by Claimants after 15.06.2004 needed some time and Arbitration Tribunal finds that further time taken by claimants to finally complete work of viaduct E-18 by 31.07.2004, was not unreasonable. The Respondents admitted that no loss has been suffered by them and while extending completion date of additional Pier I upto 15.06.2004, no penalty/compensation was levied or recovered. It was also admitted by Respondents that line was opened after March, 2005. The respondents have also issued a certificate of satisfactory completion of work in favour of the Claimants.

The Arbitration Tribunal holds that Respondents were justified to make changes and/or revise scope of work as required and needed but in case of

changing scope of work or adding certain items, reasonable extension of time has to be given to the contractor to complete balance items to treat the work complete so that payments is normal course such as security deposit, earnest money final bill etc. were released and paid, which remain blocked, unless work is certified to have been completed.

The initial time of completion was very unrealistic and considerable period was consumed in making changes and approval of design. Due to various changes and unforeseen circumstances beyond reasonable control of Claimants the completion period was got extended. This upset the working cycle and rhythm of contractor and upset cash flows so very essential for expediting completion. The cash flows further get adversely affected if contractor is not compensated for escalating in prices and a vicious cycle begins.

The Arbitration Tribunal has gone into merits and demerits and is of the view that there was no undue delay on the part of the Claimants in completing remaining work by 31.07.2004. Even the Respondents have been granting extension to period of completion without any penalty and without any liquidated damages.

The Respondents have paid some escalation of amount to claimant up to 31-08-1998 and not up to 07.08.1999 and continued to pay escalation on the balance executed work on the last indices of 31.08.1998 till completion of work, withholding application of further price indices from 01.09.1998 till completion of work. The Arbitration Tribunal has also taken note of this fact that instead of 24 months work continued up to 101 months and extra period was regularized by Respondents without penalty.

The Respondents were asked to work out, amount of escalation till 31.07.2004 and the same has been worked out and have filed through their advocate before Arbitration Tribunal duly authenticated and signed by Dy. C.E/C/JAT having examined all aspects, worked out the escalation amount payable i.e. Rs. 3,36,89,983.96. The RBI indices had to be treated as frozen till the date of completion i.e. 31st July 2004 as final for considering and

calculating the CC-57 and FCC-58 figures have to be arrived at Rs. 43,75,374.31 which when added to earlier PVC paid till CC-56 i.e. Rs. 2,85,91,951.27 coming to total amounting to Rs. 3,29,67,325.58. The Respondents had paid in running bills Rs. 1,31,52,606.01 on account of Price escalation till date of completion based on indices of 31.8.1998 and on star price items Rs. 25,58,128,29 i.e. Rs. 1,57,10,744.29 P to the Claimants. The Respondents paid the price escalation upto last bill on account of Price escalation on indices of 31.8.1998 and full escalation w.r.t. star price amounting to Rs. 25,58,128.29 upto date of completion notwithstanding extensions granting without benefit of Price Variation Clause. No liquidated damages were charged and certificate of successful and satisfactory completion issued at end of work. An amount of Rs. 1,31,52,606.01 on account of Price escalation has already been paid to the claimants as such Rs. 32967325.58 - Rs. 13152606.01 = Rs. 1,98,14,719.57 is awarded towards balance Price Variation Clause. The Arbitration Tribunal holds that the Claimants claim of escalation is justified and award to the claimants escalation amount of Rs. 1,98,14,719.57.

The aforesaid conclusion clearly shows that the contract was extended for an abnormal period of time. Not only was the contract extended for an additional period of 77 months, the fact of the matter was also that because of non-construction of an additional pier P1 which was not in the scope of the work of the respondent, but which the petitioner had got constructed through another contractor, the work in question got delayed. Further the Arbitrators have noted that there was default on the part of the petitioner in not only originally having an unrealistic time period but considerable time was consumed in making changes and approval of design and there was further delay due to various changes and unforeseen circumstances beyond reasonable control of the claimant. It is further noted that the cash flow got affected because the respondent was not compensated for the escalation payment. Another finding of fact is that the extension which has been granted to the respondent for completion of the contract was an extension without levy of liquidated damages. Once there is no levy of liquidated damages, it is quite clear that the extension is not on account of any fault of the contractor. I, therefore, do not find any fault whatsoever with the aforesaid awarding of the claim to the respondent by the Arbitration Tribunal.

[8] The counsel for the petitioner however contended that this claim of price variation was an "excepted" matter. Firstly, I do not find that this issue appears to have been argued before the Arbitration Tribunal. In an Award which is detailed and exhaustive, containing faithfully the respective submissions of the parties, I do not think that the Arbitrators would not have decided this issue if it was argued before them. It is therefore, doubtful that whether this issue, of this claim being an excepted matter, was at all argued before the Arbitration Tribunal. Further, this issue of price variation claim being an excepted matter, if it was so, was indeed an issue going to the root of the matter and if, it was argued but not decided by the Arbitrators, then, surely the petitioner would have approached the Arbitration Tribunal under Section 33 of the Act and the Arbitration Tribunal would then have observed whether this issue of price variation claim being an excepted matter was argued or not argued. Since no such application has been filed under Section 33, and which the petitioner ought to have filed, if in its opinion such a basic and vital matter was not addressed before the Arbitration Tribunal in the Award, I feel that this issue in fact would not have been argued before the Arbitration Tribunal.

> In any case, this issue cannot be said to be an excepted matter because a specific reference of this dispute was made to the Arbitration Tribunal by the petitioner itself vide the letter of the referring authority dated 5.12.2007, copy of which letter has been given by the counsel for the respondent to this Court. The counsel for the respondent has also pointed out that subsequently on 31.07.2008, on an additional representation being made by the respondent with regard to certain matters, the petitioner did not refer those disputes to Arbitration because the competent authority of the petitioner found the said matters to be excepted matters. It was therefore urged, and in my opinion rightly, by the counsel for the respondent that if the matter was an excepted matter, the same would not have been referred at all to Arbitration. This reaffirms my above finding that this issue of the price variation claim being an excepted matter would not have in fact been argued before the Arbitrators.

[9] Another argument with respect to the price variation claim was that the price variation claims, if at all, the same were to be awarded ought to have been restricted to an increase of 15% only by virtue of Clauses 32.3 and 32.4 of the Contract which read as under:

32.3 Total amount of reimbursement/recovery due to variation in prices of the several components shall be limited to 15% (i.e. 20%-5% floor price) of the amount finally payable to the contractor excluding (a) cost of cement, steel and other items, supplied by the Railway to the contractor at a fixed price, and (b) specific consultancy charges as per accepted offer.

32.4 Price variation during extended period of contract.

The price adjustment as worked out above i.e. either increase or decrease will be applicable upto the stipulated date of completion and for all extensions of time granted to the stipulated date of completion of work except etension's) granted under 17(4) of N. Rly. General conditions of contract-1989. The aforesaid ceiling of 15% will however be applicable whatever may be the actual period of execution of the contract.

At the first blush, this argument may appear to be attractive, however, there are three things which stand in the way of the petitioner. Firstly, a reference to the response filed by the petitioner in the arbitration proceedings show that except a general reference to Clause 32, no reference has at all been made to the price variation aspect to be limited to 15% only. Secondly, in fact, there appears to be a valid reason for the petitioner not to have raised this issue of limit of price variation claims within 15% only, because, the counsel for the respondent has drawn my attention to a Minutes of Meeting dated 16.11.1999 in which, in para 2, it is clearly stated that the respondent was not agreeable to work in the extended period of time unless price variation claims were granted. In this Minutes of Meeting, it is clearly recorded that this issue therefore, with respect to price variation claims, will be reviewed by the Railways. The counsel for the respondent has in my opinion rightly relied upon Asian Techs Ltd. v. Union of India and Ors., 2009 10 SCC 354, paragraphs 17 and 21, as per which once a contractor acts on a representation and does work, it is not permissible for the owner/employer to refuse and deny the valid claims and entitlement of the contractor. In the face of this understanding, I do not find any basis as to why price variation claims should be restricted only to 15% and not the actual price escalation as has been incurred by the contractor. Surely and lastly, I must state that the contractual clauses which hold that petitioner, even if found guilty of

breach of contract in causing delays, yet it should not pay actual damages of price variation, under either Section 55 or Section 73 of the Contract Act, 1872 are clearly illegal and void. In a recent judgment in CS(OS) No. 614-A/2002 titled as Simplex Concrete Piles (India) Ltd. v. Union of India dated 23.2.2010, I have held that Clauses in a contract which disentitle an aggrieved party from claiming actual damages suffered by it, either under Section 55 or Section 73, such contractual clauses are void by virtue of Section 23 of the Contract Act.

Accordingly, for all the aforesaid reasons, I do not find any valid basis to accept the arguments and contentions as raised by the counsel for the petitioner that Claim Nos. 26 and 8 pertaining to price variation have been wrongly allowed.

[10] So far as additional Claim No. 1 is concerned, this was a claim made by the respondent seeking refund of recoveries made by the petitioner for 20 ladders which were constructed by the respondent in terms of the contract. It is a fact that the contract being a lump sum contract, did in fact make a provision for providing of ladders. The respondent therefore provided the ladders and claimed payment under the lump sum amount only (and not any additional cost) for the 20 ladders. So far as the balance 19 ladders were concerned, since such ladders were not constructed, no payment has been made to the respondent under the Contract. Therefore, the Arbitrators have awarded this claim for installation of 20 ladders because they were very much within the scope of the work for which respondent was entitled to get payment. I do not find anything illegal in a person getting payment for the work done within the scope of the Contract. There is therefore no illegality or perversity with respect to this finding. The relevant portion of the Award which deals with this aspect, and which I adopt, runs as under:

The Respondents argued that inspection ladders inside piers were to be provided as per Clause 4.8.18 which were later on decided not to be provided as not required. Hence deduction for ladders has rightly been made from lump sum/value of contract, as amount for providing ladder was included in lump sum cost, whereas Claimants are claiming additional payment for providing 20 ladders and arranging materials etc. for remaining 19 ladders at site. The Respondents have recovered Rs. 7,96,000/- from payment due to Claimants for not providing ladders though 20 ladders had

been provided at site in different piers.

Clause 4.8.16 lays down that hollow piers after construction if provided shall be filled with concrete 1:4:8 up to H.F.L. The via-duct bridge was constructed not over an active river but it was local ground with depression & not subjected to floods, hence even technically filling with 1:4:8 concrete was not required. Ladders or other means are required to visually check and inspect constructed piers from time to time to carry out normal maintenance works. It was not disputed that even on date, the constructed piers could be easily and visually checked. Clause 4.8.18 lays down that ladders for inspection of galleries, inspection of platforms etc. shall be provided. The recovery as made by Respondents is not justified and it is refunded to Claimants. The claimants claim for arranging materials for remaining piers is rejected.

[11] Additional Claim No. 6 was the claim of reimbursement of risk and cost pertaining to another contract entered into between the parties. The Arbitrator notes that admittedly, the amount of Rs. 23,08,599/- was payable to the respondent under this contract, and therefore there could not be any recovery of this amount by means of an order passed under this contract. It is not the case of the petitioner that any order for withholding the amount has been passed in another contract where in fact risk purchase action has been taken. I therefore do not find any fault therefore with this finding of the Arbitration Tribunal because it is always open to the petitioner to withhold amounts by passing recovery and withholding order in the other contract, which has not been so done. Objection to this claim is therefore dismissed.

[12] The last issue which was urged before this Court was that the Arbitrators have erred in awarding interest against the contractual provisions. The counsel for the petitioner has for this purpose relied upon a recent Supreme Court judgment reported as Sayeed Ahmed & Co. v. State of U.P. and Ors.,2009 3 ArbLR 29. The relevant clause of the contract before the Supreme Court in Sayeed Ahmed's case reads as under:

No claim for interest or damages will be entertained by the government with respect to any money or balance which may be lying with the government or may become due owing to any dispute, difference or misunderstanding between the Engineer-in-charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-charge

in making periodical or final payment or any other respect whatsoever.

In the light of the aforesaid clause, which is a comprehensive clause for all the claims under the contract, the Supreme Court held that the contractor is not entitled to interest in the light of the contractual provisions.

The contractual Clause so far as the present case is concerned and which has been relied upon by the counsel for the petitioner reads as under:

16(2) Interest on amounts No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in terms of Sub-clause (1) of this clause will be repayable with interest accrued thereon.

On the basis of the aforesaid Clause 16(2) and the decision in Sayeed Ahmed's case, the counsel for the petitioner has contended that interest should not have been awarded.

[13] In my opinion, this contention of the counsel for the petitioner is not a valid contention. This is for the reason that the expression "amounts payable to the contractor under the contract" as occurring in Clause 16(2) is an expression which is necessarily to be read ejusdem generis with the expression of "earnest money" and "security deposit" as found in this very clause. That this expression should be read as ejusdem generis is clarified by Clause 16(1) which is immediately above the Clause 16(2), and which reads as under:

16(1) Earnest money and security deposit:- The earnest money deposited by the Contractor with his tender will be retained by the Railway as part of security for the due and faithful fulfilment of the contract by the Contractor. The balance to make up this security deposit which will be 10 per cent of the total value of the contract, unless otherwise specified in the special conditions, if any, may be deposited by the contractor in cash or in the form of Government Securities or may be recovered by percentage deduction from the Contractor's "on account" bills, provided also that in case of a defaulting contractor the Railway may retain any amount due for payment to

the contractor on the spending 'on account bills' so that the amount or amounts so retained may not exceed 10% of the total value of the contract.

A reading of Clause 16(1) shows that non payment of interest is with respect to the amounts which are withheld either as earnest money or security deposit. The subject Clause 16(1) is not for all amounts under the contract. In the facts of this case, interest which has been awarded by the Arbitrators has nothing to do with the amounts which have been withheld towards the earnest money and security deposit. I therefore reject the contention that no interest was payable on the amounts as awarded by the Arbitrators as the interest awarded does not pertain to earnest money or security deposit amounts.

[14] The counsel for the petitioner in addition to the judgment of Sayeed Ahmed's case has relied upon the decision of the Supreme Court in the case of M.B. Patel and Co. v. Oil and Natural Gas Commission, 2008 8 SCC 251. On a first reading, the clause in M.B. Patel's case appears to be similar to the Clause 16(2) in question, however, the Clause in the case of M.B. Patel is not similar because in the facts of the present case there are two Clauses 16(1) and 16(2) and not only one clause similar to Clause 16(2) as found in the facts of the M.B. Patel's case. In the case of M.B. Patel, the relevant clause was an independent Clause 18 which reads as under:

18. Interest on amounts:- No interest will be payable on the security deposit or any other amount payable to the contractor under the contract.

In my opinion, the judgment in M.B. Patel's case also will not apply to the facts of the present case. If there is a standalone clause like Clause 18 and which would be equivalent to Clause 16(2) in the facts of the present case, then, the expression "any other amount payable to the contractor" can be read as meaning all types of amounts payable but, as I have already stated above, in the facts of the present case, the relevant clause is only a Sub-Clause 2 of the main Clause 16(1) and therefore, the expression "any other amount payable to the contractor" has necessarily to be read in the context of Clause 16(1) and also to be therefore read ejusdem generis.

[15] The counsel for the petitioner has further relied upon a Division Bench judgment of

Gauhati High Court in Arb. Appeal No. 4/2001 dated 19.6.2002 titled as Union of India v. Major V.P. Nijhawan. It is not clear from the facts of the said judgment, that whether in that case, there were same clauses as Clause 16(1) and Clause 16(2) as found in the facts of the present case, in any case, with all due deference and humility I am not bound by the aforesaid decision and in my opinion, the facts of the present case are different. I do not therefore think that the judgment of Major V.P. Nijhawan's case will in any manner assist the petitioner.

> In this view of the matter, there is no bar to awarding of interest and in fact statutorily under Section 31(7), an Arbitrator is fully entitled to grant pendente lite and future interest unless the contract bars the same. I have already held that the Clauses in the present contract do not bar the grant of interest.

[16] I may lastly note that the counsel for the petitioner sought to urge that this issue of interest was not referred to arbitration however, I agree with the counsel for the respondent that this issue need not specifically be referred on account of Section 31(7) of the Arbitration and Conciliation Act, 1996 which gives statutory jurisdiction for the awarding of interest.

> In view of the aforesaid observations, I do not find any merits in this petition and the same is dismissed leaving the parties to bear their own costs.

I.A. No. 1123/2010 in OMP No. 44/2010

[17] Since the petition has been disposed of, no orders are required to be passed in the application.