

THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 02.07.2008

+ **OMP 123/2007**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Petitioner

- Versus -

M/s AFCONS INFRASTRUCTURE LIMITED ... Respondent

Advocates who appeared in this case:-

For the Petitioner : Mr Sandeep Sethi, Sr Advocate with Mr Kishan Kumar
and Ms Shikha Tandon

For the Respondent : Mr V.P. Singh, Sr Advocate with Mr Anil Bhatnagar,
Ms Jasleen Oberoi and Mr Manu Sheshagiri

CORAM:-

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ? YES
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. In the order dated 09.03.2007, it was made clear that the only issues which requires consideration in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') is – whether the cess imposed by the Government of Karnataka after the contract came into existence is to be borne by the respondent/contractor or can be passed on to the petitioner/employer ?
2. By the award dated 13.11.2006, an arbitral tribunal comprising of three arbitrators came to the conclusion that the increase in cost on

account of levy of the cess by the Government of Karnataka has to be reimbursed by the petitioner / employer to the respondent / contractor. The petitioner has challenged this finding of the arbitral tribunal as being contrary to the terms of the contract. It is the petitioner's case that only clause 45.1 of the General Conditions of Contract (GCC) is relevant inasmuch as it is a direct provision dealing with taxes. Consequently, the arbitral tribunal's reliance on clause 32.1 of the GCC is misplaced. It is also the petitioner's case that the minutes of the pre-bid meeting had amply clarified the position with regard to the applicability of clause 45 and that the arbitral tribunal has completely misconstrued the said minutes. Reliance has been placed by Mr Sandeep Sethi, the learned senior counsel appearing on behalf of the petitioner, on the decision of the Supreme Court in the case of **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.**: 2003 (5) SCC 705 to submit that an award which is against the terms of the contract is liable to be set aside under Section 34 of the said Act. Mr Sethi also referred to Section 28 (3) of the said Act which clearly stipulates that "*in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction*".

3. On the other hand, Mr V.P. Singh, senior advocate, who appeared on behalf of the respondent, submitted that no interference with the award is called for. He submitted that the court is not entitled to

superimpose its reasoning over that of the arbitral tribunal inasmuch as the court, in considering a petition under Section 34 of the said Act, does not sit as a court of appeal. He also placed reliance on the decision of the Supreme Court in the case of *ONGC v. Saw Pipes Ltd.* (*supra*) to submit that the court has no jurisdiction to interfere with mere errors of fact or law. He submitted that an error of law would include an error of interpretation of clauses of the contract. He submitted that though an award, which is contrary to the terms of the contract, is liable to be set aside, an interpretation placed by the arbitral tribunal, if plausible, cannot be interfered with by the court. It was further submitted that both the said clauses 45.1 and 32.1 were duly considered by the arbitral tribunal. The parties had placed their arguments on these clauses and after considering the entire material before the arbitral tribunal they came to the conclusion that clause 45.1 has to be read with clause 32.1 and that the respondent / contractor was entitled to be reimbursed for the actual payment made in respect of the cess introduced after entering upon the contract. He submitted that in these circumstances, the view taken by the arbitral tribunal was neither perverse nor contrary to the terms of the contract and, therefore, ought not to be interfered with. Reliance was also placed on the decision of the Supreme Court in the case of *McDermott International Inc. v. Burn Standard Co. Ltd. and Others*; 2006 (11) SCC 181 for the proposition that interpretation of clauses of a contract is for the

arbitrators and that courts should not normally interfere with such interpretations.

4. The disputes had arisen out of a contract for the work of six-laning of Km. 556.00 to Km. 539.00 and Km. 535.00 to Km. 527.00 of the Hyderabad – Bangalore Section of NH-7 in respect of Contract Package No.NS/24/KN in the State of Karnataka dated 30.08.2001. The respondent's bid for the said work was accepted on 19.07.2001. The commencement and completion dates were 19.09.2001 and 18.03.2004 and the agreement itself for the work was signed on 30.08.2001. The petitioner appointed an Engineering / Supervision Consultant for administering the contract and the Engineer, in turn, appointed his representative referred to as the 'Team Leader'.

5. In terms of clause 25.1 of the Conditions of Contract, the dispute was referred to the Dispute Review Expert (DRE). Since the DRE's decision regarding cess was not acceptable to the petitioner, the dispute No.2 was referred to arbitration before the said tribunal in terms of clause 25.3 of the Conditions of Contract. Dispute No.2 was as under:-

“Reimbursement of Rs.25,77,700.40 as additional cost incurred on account of the levy of cess by the State Government of Karnataka.”

6. It has already been mentioned that the bid was accepted on 19.07.2001 and the agreement was entered into on 30.08.2001. During

the progress of the work, the Government of Karnataka introduced the Karnataka Sales Tax and Certain Other Laws (Amendment) Act, 2004 (hereinafter referred to as 'the Amendment Act') w.e.f. 29.01.2004. By virtue of the said Amendment Act, *inter alia*, two sections 6-D (levy of Road Cess) and 6-E (levy of Infrastructure Cess) were inserted in the Karnataka Sales Tax Act, 1957. By the said Amendment Act, the Karnataka Government introduced the road cess as well as infrastructure cess which were not there prior to the said amendment.

7. The respondent informed the Team Leader vide their letter dated 26.07.2004 of the above legislation under clause 32.1 of the contract and also informed that they had incurred a sum of Rs 25,77,700.40 on account of levy of the aforesaid cess charges. By a letter dated 29.07.2004, the Team Leader replied that as the cess introduced by the Government of Karnataka had financial implications, the respondent should submit a self-contained statement of case covering all expenses in terms of clause 32.1 for approval of the competent authority. The details were submitted by the respondent by a letter dated 07.09.2004. The Engineer rejected the respondent's request by his letter dated 14.09.2004 stating that clause 32.1 had no relevance on the issue of subsequent legislation. The respondent was not satisfied with the Engineer's decision and indicated their intention to refer the dispute to the DRE in terms of clause 4.1 of the Conditions of Contract by their letter dated 28.09.2004. The DRE's decision was as under:-

- “(i) The Contractor is entitled, in terms of the contract, to reimbursement of extra cost incurred by him owing to levy of cess only and that he is not entitled to any extra payment due to increase in the rate of royalty on minerals.
- (ii) The Contractor be reimbursed for the payments of cess already made by him / to be made in future on the basis of the receipts of payments and other documentary evidences as considered necessary, along with interest on delayed payments as per the contract.”

Being dissatisfied with the decision of the DRE, regarding reimbursement of cess to the respondent, the petitioner submitted its claim before the arbitral tribunal for setting aside the DRE’s decision as regards the said dispute No.2.

8. Before proceeding any further, it would be pertinent to set out clauses 45.1 and 32.1:-

“45 **Tax**
 45.1 The rates quoted by the Contractor shall be deemed to be inclusive of the sales and other taxes that the Contractor will have to pay for the performance of this Contract. The Employer will perform such duties in regard to the deduction of such taxes at source as per applicable law.”

“B. **Time Control**

27.	xxxx	xxxx	xxxx	xxxx
28.	xxxx	xxxx	xxxx	xxxx
29.	Deleted			
30.	xxxx	xxxx	xxxx	xxxx
31.	xxxx	xxxx	xxxx	xxxx

32. Early Warning

32.1 The Contractor is to warn the Engineer at the earliest opportunity of specific likely future events or circumstances that may adversely affect the quality of the work, increase the Contract Price or delay the execution of works. The Engineer may require the Contractor to provide an estimate of the expected effect of the future event or circumstance on the Contract Price and Completion Date. The estimate is to be provided by the Contractor as soon as reasonably possible.”

9. It is also relevant to note that a pre-bid meeting had been held on 12.01.2001. Several questions had been asked by the contractors during the meeting and the answers thereto were provided by the petitioner. Question Nos.3 and 6 are pertinent and they are reproduced hereunder:-

S.No.	Question	Answer
1.	xxxx xxxx xxxx	xxxx
2.	xxxx xxxx xxxx	xxxx
3.	Clause 45 of Conditions of Contract on page 3-10 – Stipulates that the rates quoted by the contractor shall be deemed to be inclusive of sales tax and other taxes. Nothing is mentioned about the increase in taxes at a later date due to change in Legislation like increase in works tax, etc. F.I.D.I.C. provides for reimbursement of such increases, which should be provided in this case also.	No change
4.	xxxx xxxx xxxx	xxxx

5.	xxxx xxxx xxxx	xxxx
6.	Official retail price of Bitumen – It may please be confirmed that the official retail price of bitumen specified in the item No.28 (iv) on page 4-5 of Contract Date will be inclusive of excise duty, sales tax and all other taxes.	The clause is amply clear
	xxxx xxxx xxxx	xxxx

With reference to the aforesaid questions and answers, it was contended on behalf of the petitioner that clause 45 of the Conditions of Contract had been clarified to indicate that increase in taxes at a later date would be covered in the prices quoted by the contractors and that there would be no change in the said clause 45. With regard to the retail price of Bitumen also, when the question of whether it would be exclusive of excise duty, sales tax “and all other taxes”, was raised, the answer provided was that “the clause is amply clear”. According to the petitioner, these answers clarified that increase in taxes would have to be absorbed by the contractors.

10. On the other hand, it was contended on behalf of the respondents that this clause, i.e., clause 45, had to be read with clause 32.1 and that since the dispute in the present case involved the introduction of a new cess, which could not have been in the contemplation of the respondent, there was no question of not reimbursing the respondent for the increase in cost resulting from such new levies of cess.

11. The DRE's decision on the said dispute No.2 dated 26.05.2005 indicates that although the minutes of the pre-bid meeting did not notify the contract conditions, the said meeting did make it clear that future increase in taxes, etc. will not be payable separately and that the bidders should quote accordingly. However, the DRE was of the view that since the cess in question was a completely new levy by the State Government and the effect of which no bidder could have included in his rates as the same did not exist at the time of the bid nor could have been foreseen or anticipated by any bidder, the respondent / contractor was entitled to be compensated for the extra financial burden on account of the levy of the cess.

12. The arbitral tribunal took the view :-

“... In this case the Tribunal finds that the increase in cost on account of levy of cess due to change in legislation introduced by the State Government of Karnataka after the award of contract is covered under clause 32.1 of the conditions of contract. Clause 45.1 is a deeming clause, which provides that the rates quoted by the contractor shall be inclusive of the sales and other taxes that the contractor will have to pay for the performance of the contract. The Learned Advocate for the Employer has stressed on this clause and insisted that the amount paid by the contractor due to introduction of cess cannot be reimbursed. He has also linked clause 32.1 to clause 28.2 (extension of intended completion date) clause 40.5 (payment for variation) and clause 44.4 (compensation events) in which reference to early warning being given by the Contractor has been given. After carefully considering and construing the provisions of the contract, the Tribunal finds that Clause 32.1 is unambiguous and instructs the Contractor to warn the

Engineer at the earliest opportunity of the specific likely future event or circumstances that may adversely affect the quality of work, increase the contract price or delay the execution of work. In the dispute before the Tribunal only increase in the contract price is under consideration. The Tribunal has no hesitation to hold that the interpretation of the Team Leader of this Clause in asking the contractor to provide an estimate of the increase in cost due to increase in rates of Royalty and introduction of cess in terms of Clause 32.1 was correct and the rejection thereof by the Engineer was not justified. The Tribunal further holds that Clause 45.1 has to be read along with clause 32.1 and it does not supersede clause 32.1. Legislation of Revision of royalty rates and introduction of cess on Minerals by Karnataka Government was made subsequent to date of start of this contract and is covered under the future events. Hence, the additional amount actually paid by the Contractors due to levy of cess is to be reimbursed to the Contractor.”

13. The question that arises at this juncture is – whether the interpretation cast upon the said clauses 45.1 and 32.1 and the decision arrived at by the arbitral tribunal is contrary to the terms of the contract? In *ONGC v. Saw Pipes Ltd (supra)*, the Supreme Court held that if an arbitral tribunal ignores the terms of the contract or usages of the trade applicable to the transaction, the award could be set aside.

The Supreme Court held as under:-

“15. Result is – if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties.”

The Supreme Court also interpreted the phrase “public policy of India” as under:-

“Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in **Renusagar Power Co. Ltd. v. General Electric Co.:**1994 Supp. (1) SCC 644, it is required to be held that the award could be set aside if it is patently illegal. Result would be--award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.”

14. Considering the declaration of the law by the Supreme Court in *ONGC v. Saw Pipes Ltd* (*supra*), I find that the present case is not one where the arbitral tribunal has ignored the terms of the contract. What the arbitral tribunal has done is to arrive at a particular interpretation after considering the relevant terms of the contract and, just because the interpretation that has been arrived at by the tribunal is not palatable to the petitioner, is not ground enough for interfering with the award. Such interference can only be justified where the award is contrary to

the substantive provisions of law or the provisions of the Act or if it is against the terms of the contract. The award must be so patently illegal and that it goes to the root of the matter. If the illegality is of a trivial nature, the award cannot be said to be against public policy. The award must be so unfair and unreasonable that it shocks the conscience of the court. It is then that such an award can be said to be opposed to public policy of India. I do not find the present award to contain any such patent illegality, much less an illegality which goes to the root of the matter. The award is also not of such a kind that it shocks the conscience of the court. The arbitral tribunal has merely interpreted clauses 32.1 and 45.1 in a manner which is plausible. This being the case, no interference is called for.

15. In *McDermott International Inc. (supra)*, the Supreme Court restated a long-standing principle that the construction of a contract is within the jurisdiction of the arbitrators and interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to the determination of a question of law. Reliance had been placed on *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*: 2003 (8) SCC 593 and *D.D. Sharma v. Union of India*: 2004 (5) SCC 325.

16. The interpretation of the contract and in particular of clauses 45.1 and 32.1, as determined by the arbitral tribunal, is certainly not one which can be said to be contrary to the terms of the contract or

perverse. The DRE as well as the arbitral tribunal were of the view that the new levies of cess by the introduction of Sections 6-D and 6-E by the said amendment could not have been in the contemplation of the contractors when they submitted their bids. Therefore, there was no question of them including any amount towards such cess in their bids. While it is true that the effect of taxes and any increase in such taxes had to be factored into the bids submitted by the contractors, they related only to existing taxes and not to levies which were not even in contemplation. Whether this view is the correct view or not, is not of much relevance. What is relevant for the purposes of a petition under Section 34 of the said Act is whether such a view is a plausible one. I have already indicated above that it is so.

17. Under these circumstances, the petitioner has not been able to make out a case for interference with the award. The petition is dismissed. No costs.

(BADAR DURREZ AHMED)
JUDGE

July 02, 2008

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