

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+

O.M.P. NO. 287/2005

Reserved on 09.01. 2008

Date of decision : January 14th, 2008

M/s. S.K. Contractor & Engineers

..... Petitioner

Through : Ms. Anusuya Salwan, Ms. Renuka Arora, Advocates

:: VERSUS ::

Hindustan Petroleum Corporation Ltd. ANR..

... Respondents

Through Mr. V.K. Srivastava, Advocate

CORAM:

Mr. Justice S. Ravindra Bhat :

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

MR. JUSTICE S. RAVINDRA BHAT:

1. This is a petition under section 34 of the Arbitration & Conciliation Act, 1996 (hereafter referred to as the Act). The petitioner challenges an award dated 30th May, 2005, of a Sole Arbitrator appointed pursuant to agreement between the parties.

2. Briefly, the facts are that the claimant was awarded contract for the

fabrication, supply and installation of pre-fab structural canopies at various retail outlets of the respondent corporation in its Jodhpur Retail Region on 10.9.2001. The order originally was for the value of Rs.37, 15,740. According to the agreement, 1260 sq. metres of the fabrication, supply and installation of the product had to be supplied according to the specifications agreed. The completion period prescribed was 60 days per site, from the date of handing over of site, according to clause 4 of the Tender documents, incorporated as a part of the work order/contract. The parties agreed to submit their disputes and differences in relation to the contract or concerning its terms, for decision by an arbitrator.

3. The petitioner invoked the arbitration clause; as a consequence the Managing Director of the respondent referred the disputes for decision to a Sole Arbitrator. In its statement of claim, filed on 12.7.2004, the petitioner alleged that after the award of contract, its representatives visited the corporation's office and were directed to collect relevant papers from the Regional Manager's office. They were also asked to prepare plans for Canopies at various locations at Rajasthan. According to the claimant, the preliminary sketches were prepared and submitted to the respondent for due consideration; after approval final designs were prepared to facilitate commencement of the job. The claimant alleges that despite their submissions of designs, the respondents did not accord approval nor send any communication intimating it to start the job. It

also relied on various letters and correspondences requiring approval of designs for small size canopies before permission for fabrication of big size canopies. The petitioner alleged that it notified the variation in the standards and other parameters such as higher costs to the respondents which ignored these material factors. The petitioner alleged that it was not permitted to execute the job. It, therefore, sought for recovery of Rs.2, 26,000/- relating to the job undertaken by it. This included the sum of Rs.124000/- towards payment for design and calculation work (8 numbers) and Rs.1, 02,000/- for providing/construction of foundation including steel, PCC, RCC, excavation, etc. The petitioner claimant alleged that an unjustified and illegal recovery of Rs.2, 61,135/- was made and not refunded to them. Another illegal adjustment of a similar amount i.e. Rs.2, 61,135/- towards penalty was alleged. The petitioner further claimed that compensation for interest till the date of award at 18% per annum working out to Rs.1,34,767/-. A last head claimed was compensation for protected correspondence and loss of profits etc. @ Rs. 50 lakhs.

4. The respondent corporation denied all claims and justified its position regarding imposition of penalty for the sum of Rs.2,61,000/-, by recovering it from the amounts claimed by the petitioner towards the work done and further deducting a similar amount from other contractual payments in relation to other transactions. It denied any other liability.

5. After considering the pleadings and materials furnished by the parties, the arbitrator gave his findings in the impugned award, in the following terms:-

“After placement of PO, the claimant submitted the drawings to the Respondent for approval purposes to withstand air pressure 170 Km/hr whereas as per the technical specification the wind pressure required for the said canopy was 200 kh/hr. The claimant was advised to workout the revised designs accordingly and resubmit the same.

The claimant has made submissions that he had already submitted the revised drawings to the Respondent, but however, he had not produce any documentary evidence or token of receipt for having submitted revised drawings as claimed. From the respondent side they submitted copies of their communication dated 13.11.01, 15.11.01 and 20.11.01 for having cleared the site to enable the claimant to start the work in those work locations. However, the claimant could not advance any documentary proof to establish his having submitted structural designs.

From the above communication from the Respondent to the claimant it is quiet evident that the Respondent really intended the claimant to carryout the job. It is further emboldened by the fact that the claimant did not furnish the required security deposit as per the terms of the P.O., the Respondent did not even demand or press for payment of the Security Deposit by the Claimant. Thus it is established that the Respondent had genuine intentions and bona fide belief that the claimant would carry out the job assigned accordingly and as per the PO terms. However, in spite of various communications directed by the Respondent, the claimant did not carry out the job and also did not submit structural designs as per the technical specifications. It is also established by looking at the letters written on various occasions from the respondent to the claimant that time and again the claimant did not heed to the requests and direction of the respondent to the claimant to make

these available at the work sites to carryout the jobs. But the claimant never cared to carry out the job by mobilizing the required work force.

Hence, I am of the opinion that the deduction of Rs.2,61,135/- is justified under the clause No.4.5 of the purchase order.

Award on Issue No.1 :

As regard issue no. 1 the claimant has to carry out the job as per the technical specifications as anybody who quotes the rates quote as per the technical specifications only it being the main scope of the Contract.

Award on Issue Nos. 2 & 4

Regarding issue no. 2 whether claimant committed any breach of contract, I am of the opinion that there is definite breach occasioned due to claimant's failure to report at the site as per the PO terms and to carry out the job where as for the 6 foundations constructed by the claimant in PDJC, Bandhu the cost thereof stands settled by the interim award passed by me earlier on 09.December 2004 @ 75% and for the balance 25% being Rs.17,722.02/- the same is ordered to be paid by the Respondent along with the interest at prime landing rate of the State Bank of India from the date of completion of those foundations till date of payment.

Award on Issue No.3

For the rest of job awarded under the PO, it is clearly proved that there was non-performance by the claimant warranting any payment. Accordingly the claim of Rs.2,61,135/- made by the claimant is accordingly rejected.

Award on Issue No.5

Regarding the payment of Rs.15,500/- per drawing, Respondent said these drawings were not as per the specifications and he was

advised to re-submit the same. Whereas the claimant said he submitted the drawings but however he cannot give any evidence. In view of the above I am of the opinion since claimant has spent some money for preparation of the drawing Respondent is advised to pay @Rs.5,000/- per drawing.

Award on Issue No.6

For the claim of Rs.50 lacs preferred in the claimant as compensation there is no merit in the same and accordingly it is rejected.

Award on Issue No. 7

As regards the issue of payment of cost to the Respondent, in view of the fact that they have not submitted any supporting documents to substantiate the Arbitration cost so claimed, the same is liable to be rejected.

Thus it is adjudicated and rejected.”

6. The petitioner has objected to the award and alleged that the arbitrator considered matters beyond his purview. It is alleged that the arbitrator ignored its evidence placed on record proving that the respondent had approved three lay out plans for designing and calculation of pre-fab canopies. The findings of the arbitrator upholding deduction of Rs.2,61,135/- under clause 4.5 of the contract were challenged as illegal . It was alleged that the condition was in the form of liquidated damages thus obliging the respondent to apply its mind and inform the petitioner the reason for imposing such penalty. The other objection for imposition of penalty was that the maximum amount liable to be recovered was 5% of the total contract value, whereas a

sum of Rs.2,61,135/- was far in excess of it.

7. The award is also assailed as regards issue Nos. 2 and 4 on the ground that the arbitrator should have allowed the full claim of Rs.1,02,000/- instead of Rs.70,888/-. The finding on issue No.3 is attacked on the ground that it is unsupported by any condition in the contract or beyond the purview of law. The findings on issue Nos. 5 relating to claim for Rs.15,500/- per drawing are also challenged. It is alleged that there is no rational for rationale only Rs.5000/- on this head of claim.

8. Before advertng to the scope of proceedings U/s 34 of the Act and applying settled principles, it would be useful to extract the stipulation in the contract, concerning liquidated damages i.e. contained in clause 4.5; it reads as follows:-

“Completion period of each site shall be deemed as the essence of the contract. In case of delay in completing the work beyond the specified completion date, the contractor shall be required to pay a penalty at the rate of 0.5% of the total contract value i.e. the total cost at the total contract is awarded but exclusive of value of items of the scope of HPCL's supply, for every week or part thereof the delay subject to a maximum of 5% of the total contract value. The penalty shall be recovered either from the contractor's bills or from the security deposit/retention money or from any amount due to the contractor from HPCL”.

9. After coming into force of the Act, intervention of courts with awards of arbitral tribunals is confined to grounds enacted under Section 34. This provision was

scrutinized by the Supreme Court, in *Oil & Natural Gas Vs. Saw Pipes Ltd.* 2003 (5) SCC 705 where the Court held that interference was permissible on grounds of public policy, which in turn was explained as the award being contrary to :

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

10. The above decision was affirmed in *Hindustan Zinc Ltd. Vs. Friends Coal Carbonization* 2006 (4) SCC 445; *Mc Dermott International Inc Vs. Burn Standard Co. Ltd.* 2006 (11) SCC 181. In both cases, awards or portions of awards which were contrary to contract or contravened substantive provisions of law, were set aside.

11. Ms. Anusuya Salwan, Learned counsel relied upon clause 4.5 of the contract and submitted that the award was contrary to the plain terms of the contract as it affirmed deduction of penalty in excess of the agreed quantum. She also submitted that besides this provision, there was no condition entitling the respondent to effect cuts of the petitioner in relation to other contracts. Thus, the deduction in excess of Rs.2,61,135/- from other bills was contrary to contract and also unsupported in law. Learned counsel relied upon the decisions of the Humble Supreme Court reported as

Union of India Vs. Pundarekakashudu 2003 (8) SCC 168 and *K.P. Poulouse Vs. State of Kerala* AIR 1975 SC 1259 in support of the submission that findings contrary to terms in contracts amounted to mis-conduct by an arbitrator.

12. Learned counsel also submitted that the award has to be set aside for not adjudicating claims beyond Rs.70,888/-, i.e. the amount admitted by the respondent. The total claim in this regard was Rs. 1,02,000/-. Similarly, counsel submitted that the claim for Rs.15,500/- per drawing admittedly furnished to the respondent was overlooked and only a sum of Rs.5000/- was awarded. Lastly, learned counsel contended that the arbitrator erred in not awarding any sum towards the compensation claimed i.e. Rs.50,00,000/-.

13. Mr. Nandan K. Jha , Learned counsel justified the deduction of amounts payable to the petitioner from other bills submitted by it unrelated to the contract, by relying on the last portion of clause 4.5. As regards the penalty levied, learned counsel submitted that the materials showed that the petitioner had not complied with the terms agreed upon despite lapse of 21 months. It was submitted that the agreed period under the contract was 60 days. Learned counsel submitted that as regards other claims, the arbitrator was fully justified in making the award as he did. It was, therefore, submitted that the award was not opposed to public policy since it was not contrary to fundamental principles of Indian law or any of the parameters mentioned by the

Supreme Court.

14. From the above discussion, it is clear that the power to levy penalty is controlled by clause 4.5, which provides for liquidated damages. It enables the respondent to deduct or levy upto 5% of the total contract value. In this case the contract was for Rs.37,15,740/-. In the circumstances, the maximum penalty which could have been levied was Rs.1,85,787/-. On an application of the standards laid down by the Supreme Court, it is clear that adjustment of Rs.2,61,135/- from the running bills of the petitioner was impermissible. Therefore, the affirmation of deduction or adjustment on this head beyond Rs.1,85,787/- cannot be sustained. There is no provision in the contract nor was any general term agreed upon by the parties or any provision of law brought to the notice of the court enabling the respondent to deduct moneys payable to the petitioner accounts in relation to other transactions and contracts from the present contract. Wherever the law enables special contracting parties to enjoy such special privileges, there is a well recognized rule or principle. Thus, for instance a banker can exercise a general lien to adjust its claims regardless of the number of accounts of its customer or borrower; a carrier or bailee or warehouseman is entitled to lien for charges payable and can exercise it under specific provisions of law. In the absence of any legal provision or established usage, contracting parties cannot claim the right to such general set off. The award to the

extent it permits the respondent to deduct the sum of Rs.2,61,135/- from other contractual payments due to the petitioner is contrary to contract and also contrary to fundamental principles of law.

15. As far as the other objections to the award are concerned, this court is unable to discern any fundamental violation of established principles of law. The arbitrator awarded 75% of the amount claimed under issue Nos. 2 & 4. This court cannot appreciate the evidence as an appellate forum and decide on the correctness of such determination. Similarly, the materials on record persuaded the arbitrator to award only Rs.5000/- as against a claim for Rs.15,500/- in respect of the drawings for eight foundations. That finding too cannot be termed as contrary to the contract or contrary to public policy as spelt out by the Supreme Court in the *Saw Pipes* decision. So far as the claim for Rs.50,00,000/- is concerned evidently the petitioner did not lead any evidence to support its demand. In the circumstances no infirmity can be found with the award on the score.

16. In the light of the above discussion, this petition has to be partly allowed. The impugned award is set aside to the following extent:-

- a) So far as it upholds the penalty imposed on the petitioner beyond the sum of Rs.1,85,787/- . The petitioner is entitled to refund of

the balance i.e.. Rs.75348/-.

- b) So far as it upholds recovery of Rs.2,61,135/- from petitioner's bills in relation to other contracts.

17. The respondent is liable to pay the above-said amounts to the petitioner who is also entitled to interest @ 9% per annum from the date of claim in arbitration as also *pendente lite* interest for the duration of the present proceedings, and interest at the said rate till realization of all dues from the respondent. The petition is decreed in the above terms with costs quantified at Rs.20,000/- in favour of the petitioner.

January 14th, 2008
Pkv

(S. RAVINDRA BHAT)
JUDGE