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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) No.1057/1999

1st December, 2009

ELECTRICAL MANUFACTURING COMPANY LTD.

...Petitioner

Through: Mr. C. Mukund, Advocate, with Mr.
P.V.S.Raja, Advocate, Mr. Ashok Jain,
Advocate and Mr. Pankaj Jain,
Advocate.

VERSUS

POWER GRID CORPORATION OF INDIA LTD. AND ORS.

....Respondents.

Through: Mr. Pawan Upadhyay, Advocate with
Mr. Prashant Neal, Advocate, Mr.
Param Kumar Mishra, Advocate and
Mr. Anish Kumar Maggo, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the 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?

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JUDGMENT (ORAL)

VALMIKI J. MEHTA, J.

I.A.No.1110/1995 in CS(OS) No.1057/1999

1. This judgment disposes of the objections filed by M/s. Power Grid Corporation of India under Sections 30 and 33 of the Arbitration Act, 1940 challenging various claims as awarded by the Arbitration Tribunal in its Award dated 31.3.1999.

2. I shall take up each claim as awarded by the Arbitrator and as objected to by the respondents/objector.

3. Claim No.1 pertains to the claim of the non-objector for price variation during the prolonged period of contract and which was alleged to have been caused on account of delay and breaches on the part of the respondents. This claim was basically a claim for compensation on account of delay due to breaches/defaults and failure of the objector to fulfill their contractual obligations. Before proceeding to consider the argument of the objector under this claim, I note that the Arbitrators have under five heads classified as (A) to (E) held the objector guilty of breach of contract by causing delays. The aforesaid heads which have been dealt with by the Arbitrator are as under:

(A) The Quality Assurance Programme(QAP) was a basic document which had to be finalized before the contract was to be signed. It has been found as a matter of fact that whereas the contract was awarded on 30.4.1986, the Quality Assurance Programme(QAP) was finalized subsequently as late as on 1.10.1986.

Accordingly, the Arbitrators have held that the objector cannot be fully absolved of the delay in finalization of the Quality Assurance Programme(QAP).

(B) The second head which has been dealt with by the Arbitrator is that there was delay on behalf of the objector in finalization of the Contract Coordination Procedure (CCP). The contract originally was to be awarded to one party, however, subsequently it was awarded to two parties, one of which was the non-objector. As a result of this there was required a Contract Coordination Procedure. The Arbitrators have, in this behalf, held that the Contract Coordination Procedure was approved only in December, 1986 and which in fact was further revised in April, 1987.

(C) The Arbitrators have held that the objector was guilty of delay in issuing of Project Authority Certificate (PAC) and which was required because high tensile steel was required to be used in fabrication of the tower parts and which steel was to be imported against this PAC resulting in contribution of delay in making the supplies.

(D) There was delay in finalization of the Contract Bar Chart viz the schedule of the activities. The Award notes that whereas as per the contract, the supplies had to commence in June, 1986 but the Quality Assurance Programme was itself finalized on 1.10.1986 obviously therefore there is an inherent contradiction in the Bar Chart which requires supply of materials since June, 1986 because till the

Quality Assurance Programme was finalized on 1.10.1986 there could not arise any issue of finalization of the supplies.

(E) The Arbitrators, then, have dealt with delays in approval of the route alignment and detailed survey certificate. Under this head, the Arbitrators have noted the problems with respect to route alignment and delay in approval of the route alignment and non finalization of the tower types and quantities as a result of which delays were caused in the tower supplies as a logical consequence. The Arbitrators have also noted that clause 1.10.1 of the contract provides that final tower quantities are to be confirmed by the owners and the claimants were required to propose the tower types, numbers etc. only after the detailed survey/route alignment. The Arbitrators further note under this head that the respondents could not obtain permission for executing the work in the forest area for a long period of time. The Arbitrators finally note that tower quantities were confirmed for the first time that too provisionally only vide NTPC letter dated 30.12.1987.

After noting the arguments, evidence and pleadings the Arbitrators have dealt with this claim No.1 in extenso from page Nos. 3 to 15 of the Award and ultimately allowed a sum of Rs.42,17,528/- against the claimed amount of Rs.1,26,52,586.49. Before awarding this amount, the Arbitrators have noted that the claimant filed their computations, but the respondents failed to file their computations. The Arbitrators further note that the respondents did not file any objections to the computations

submitted by the claimants/non-objector.

4. The only contention which was raised by the counsel for the objector in this regard pertaining to claim No.1 was that the findings of the Arbitrator with respect to the Bar Chart are incorrect. Firstly, I do not find any fault whatsoever in the Award when it deals with delay caused on account of the Bar Chart finalization because under head (D) with respect to claim No.1, the Arbitrators have considered this aspect in detail and have noted the reasons for this delay in finalization of the Bar Chart and also that there was an inherent contradiction in the same with respect to the dates. In any case even for the sake of arguments, If I accept this argument of the objector that the Arbitrators were not justified in their findings under head (D) pertaining to the contractual Bar Chart I may note that the Arbitrators have held the objector guilty on account of contractual breaches and delays not only because of one head of delay viz of the Bar Chart issue, but, because of a total of four other heads also, and each of which have been held against the objector, in order to finally hold the objector guilty of contractual breaches. Further, it is not as if the entire amount has been awarded as prayed for by the claimant/non-objector. Whereas the claimant had prayed for a sum of Rs.1,26,52,586/-, the Arbitrators have only awarded one third of the amount. Therefore, I feel that if there was any grievance, the same in fact would have been of the non-objector/claimant because once the Arbitrators have held the objector guilty of various delays by detailed reasoning, it

is not understood as to how the Arbitrators have reduced the claim from what has been asked for to one third of the amount. In any case, no objections have been filed by the petitioner/claimant/non objector and therefore, awarding of a lesser amount than as claimed cannot be a ground of objection which the objector can urge to say that the Arbitrators are unjustified in making a deduction of two thirds of the amount claimed. It is settled law that on the basis of available material an Arbitrator can make an honest guess work. It is also settled law that this Court cannot go into the reasonableness of the reasons as given by the Arbitrators. In fact, the reasons which are given by the Arbitrators are indeed sound and justified reasons with respect to awarding of the amount under this claim No.1. Consequently, in view of the aforesaid discussion, I do not find that the Arbitrators have in any manner misconducted themselves or the proceedings. The objection, therefore, with regard to claim No.1 is misconceived and is therefore dismissed.

5. The next claim against which objection was raised was the Award with respect to claim no.3 by the Arbitrators for additional supplies made by the claimants for a total sum of Rs.7,80,121/- due to the event of a collapsed tower. The arbitrators have held that the total supply effected by the claimant was 238.521 MT as reflected in Annexure C-3 and that after reducing therefrom 172.571 MT of collapsed tower parts the balance supply of 72.517 MT of tower parts and 10.516 MT of nuts and bolts were required to be paid for. Frankly, I have totally failed to

understand this reasoning on the part of the Arbitrators. This finding pertaining to claim no.3 is clearly perverse for the reason that it was in the scope of the work of the claimant/non-objector to supply everything and anything pertaining to the transmission tower. If what has been supplied is towards the transmission tower, its weight and content is surely within the scope of supply, and nothing extra can be paid for what is otherwise in the scope of the work. A reference to the document Annexure C-3 being the letter dated 11.9.1990 as relied upon by the Arbitrators in fact shows that the supplies for which claim was made by the claimant pertained very much to the scope of the work under the contract in as much as one of the tower had collapsed and the additional supply which was done, for which claim was made, was towards the collapsed tower. The letter Annexure C-3 clearly notes that the claimant had to take its claim from the insurance company and it was solely responsible for pursuing of its claim before the insurance company and the claimant in fact received certain amount from the insurance company towards the collapsed transmission tower. Thus, it is quite clear that the supply within the scope of the contract cannot by any stretch of imagination be treated as an additional supply not covered under the contract and which has been wrongly so done by the Arbitrator for awarding this claim. The awarding of this claim therefore, clearly goes against both the letter and spirit of the contractual provisions, and I am of the clear opinion that Arbitrators have therefore misconducted themselves and the proceedings by

awarding as a claim the claim for additional supplies for supplies which were otherwise very much within the scope of the contract. The contrary finding therefore, is clearly perverse and I therefore, set aside this claim which has been awarded with respect to the so called additional supplies for Rs.7,80,121/-.

6. Claim No.4, I may state, was only pressed for the purpose of record because the amount awarded under this claim was only for Rs.10,681/-. In view of the fact that no substantial arguments could be raised against this claim, I do not find any reason to set aside the award with respect to this claim No.4.

7. Claim no.5 of the claimant before the Arbitrator was for the claim of alleged wrongful recoveries which were made by the objector. According to the claimant, the wrongful recoveries which were made by the objector were on account of hire charges towards the tools and plant which were supplied by the objector to the claimant. I may at this stage note that the contractual provisions did in fact provide for payment for hire charges by the claimant to the objector in terms of the contract and which contractual charges were Rs.59,000/- per month. The claimant however sought to retract from this position and wrote a letter dated 8.5.1989 stating that it would pay only a nominal rent of Rs.5,000/- per month and not what is contractually payable. The Arbitrators have relying upon this letter held that the respondent was not entitled to make recoveries at the contractual rate of hire charges. To counter this part of the Award the counsel for the objector has taken

me through the agreed Minutes of Meeting (MOM) dated 10/11.6.91 and para 9(b) thereof. The MOM clearly notes that the objectors have informed the claimant that its contention with regard to not paying the contractual hire charges was not accepted since the beginning and in fact this paragraph duly notes that the parties agreed that an amount of Rs.2,05,506/- is in fact payable by the claimant to the objector not otherwise as awarded by the Arbitrator. Admittedly, there is nothing on record that the claimant in any manner objected to this MOM, which meeting was attended by both the parties, and which MOM contained the agreed position emerging after the discussions. The Arbitrators have not referred to this MOM in the Award, which shows an agreed position, that, it was not the claimant who was entitled to monies but it was the objector who was entitled to the hire charges of Rs.2,05,506/- as the balance due. Therefore, it is not understood that how in spite of the agreed MOM, which in fact imposes liability upon the claimant and not upon the objector, can the Arbitrators award a sum of Rs.1,45,500/- to the claimants under this head of claim. For the purpose of record, I may note that the objector did not refer to the document dated 10/11.6.91 in its objections petition, however, the said document being an admitted document and since the interest of justice clearly requires that the admitted documents be considered by this Court to set aside the manifest error in the Award by allowing the claim which was patently and clearly against the agreed MOM, I have been persuaded to look at this document to set

aside the award of claim under this head for Rs.1,45,500/-.

8. Claim Nos. 6 and 11 have to be dealt with together as these were the claims pertaining to entitlement of price variation and idling of stringing gangs and tower erection gangs and other related compensation amount. Under this head after giving detailed reasons by referring to the evidence and the letters filed, the Arbitrators have recorded that there were huge problems with respect to right of way along the route. The Arbitrators also note that in certain cases the workmen of the non-objector were beaten up. The Arbitrators have further given a finding that various problems including that of right of way led to shifting of gangs to discontinuous locations which increased the required efforts and expenditure in executing the work. The respondents were also guilty of various other delays including the delay in providing of permission for working in the forest area and which also further led to idling of the labour gangs. Before this court what the objector has basically canvassed is that though the Arbitrators have referred to various letters but in fact no letters were filed by the non-objector/claimant. I find that this argument is totally misconceived because before the Arbitrators, various letters with its Annexures, have in fact been filed, and to refer to a few letters, I may mention those dated 21.9.1989; 25.11.1989; 25.8.1987 and 30.12.1989 and each of which letter refers to the problems which were faced by the claimant with respect to the right of way and difficulties caused by certain influential villagers objecting to

the work which the claimant was to undertake under the contract. I am not making a detailed reference to what is said in those letters which are in fact accompanied by Annexures giving the scenario of constraints, but since the objection is only that such letters were not filed, it is therefore however quite clear that the contention of the objector is misconceived that no evidence was filed by the claimant for allowing of this claim. This objection, therefore, is misconceived and accordingly, no fault can be found for awarding of this claim by the Arbitrator.

9. Claim No.7 pertains to the claim towards extra work done for the hard rock foundations. I may note that the Arbitrators have noted that after detailed arguments and respective contentions were considered, ultimately, it was decided that out of 57 foundations only 23 foundations were required to be fully paid at the hard rock foundation rates. The Award records and shows an agreed and admitted position before the Arbitrator that for 23 foundations payment is to be made for hard rock foundations. Accordingly, once this admitted position emerges, and which has never been challenged by the objector by filing an application before the Arbitrators, that the said agreed position is wrongly recorded, today at this stage in 2009 when the Award is of the year 1996 it is not possible to sustain the objections of the objector in this regard that there is no agreed position as recorded. Reference in this behalf is invited to *State of Maharashtra Vs. Ramdas Shrinivas Nayak, 1982 (2) SCC 463* that where a judicial order records a fact then, that fact is final

unless challenged immediately before the judge who recorded the factual aspect. Therefore, this claim No.7 for Rs.6,96,202/- has been validly awarded and I do not find any basis to sustain the objection in this regard.

10. Claim No.8 pertains to the claim of expenditure incurred by the claimant towards transportation of materials and which claim was of Rs.8,06,250/-. Before advertng to the arguments of the objector it would be appropriate if I refer to the finding under this claim in the Award and which runs as under:

“ After considering all the pleadings, evidences and arguments of both the parties we have arrived at the following findings:

Under clause 9.1 of Technical Specifications, it is the contractor who is responsible for transportation of all the materials to be provided by him as per scope of the work at site along with setting up of required number of stores along the line. The case of the contractor is that since time was short and work had to be completed by a particular date, this additional cost was incurred.

In absence of any cogent evidence the claim is allowed to the extent of 1/3rd i.e. Rs.268750/-. Awarded accordingly.”

It is quite clear that the cryptic finding and the logic of the Arbitrators is unsustainable. Once the Arbitrators note that there is a clause 9.1 of the Technical Specifications as per which it is the contractor who is responsible for the entire transportation, then how can it be that the contractor can get any additional charges for transportation. Not only that, the Arbitrators have noted that there is no cogent evidence with respect to this claim. Therefore on both counts of there being a contractual clause to the contrary viz clause 9.1 of the Technical Specifications and the fact that the Arbitrators admit that no cogent evidence was available, and

yet they allowed a claim of Rs.2,68,750/- under this head, shows that the Arbitrators have clearly misconducted themselves and the proceedings by not only going against the contractual provisions but the basics with respect to the law of evidence. A mere claim cannot mean that the same has to be allowed unless there is some reasonable evidence to sustain this claim. No doubt, the provisions of the Evidence Act, 1872 are not applicable to arbitration proceedings, however, surely, some sort of basic evidence must be filed in order to enable the Arbitrator to make further an honest guess work on the basis of the same. In this case, once the Arbitrators record that there was no cogent evidence, I do not think it was justified for the Arbitrators to award any claim under this head, more so in view of the fact that the contractual provision being clause 9.1 of the Technical Specifications in fact provides that the transportation obligation was on the claimant, and obviously therefore the cost of transportation of everything to be transported under the contract is to the account of the claimant. This claim award is therefore misconceived and set aside.

11. The other claim which has been strongly objected to by the objector is awarding of Claim No.10 for an amount of Rs.7,82,692/- for additional concreting. Once again in order to appreciate the contention of the objector it would be necessary to refer to the Award with respect to this claim No.10 and which reads as under:

“ This claim of Rs.7,82,692/- was discussed by the parties during their meeting before the invocation of Arbitration. A liability in

principle towards this claim was agreed in the Minutes of meeting dated 20.9.90 but the actual amount was not settled. After considering all arguments, pleadings, evidences etc, we feel that the ends of justice will be met if 1/3rd of the claimed amount is accepted. Accordingly, we award a sum of Rs.2,60,897/- only to the Claimants under this claim.”

The aforesaid discussion shows that this part of the Award is bereft of any valid and intelligible reasons. There are in fact no reasons whatsoever, except the Arbitrators stating that they have considered the arguments, pleadings and evidence and have thereafter awarded 1/3rd of the claimed amount. The counsel for the objector has in fact, to urge the contrary position that this claim ought not to have been awarded, taken me through the letter dated 7.9.1990, written by the claimant/non-objector itself to the objector, and annexing thereto a bill dated 26.8.1990 for this amount of Rs.7,82,692/-. A reference to this bill shows that this bill was towards additional concreting. The MOM dated 20.9.1990 clearly shows, in its paragraph No.5, that the objector duly explained to the claimant that whatever be the concreting required within the scope of the work the same had to be on the account of non-objector/claimant and no additional payment can be claimed on that basis. Therefore, no payment could be claimed under this head of additional concreting for Rs.7,82,692/- and which this MOM records as non-payable to the claimant. I may again note that to this MOM , no objections whatsoever have been raised at any stage by the claimant/non-objector. Therefore, a reading of this paragraph 5 of the MOM dated 20.9.1990 makes it more than abundantly clear that

the Arbitrators could not have awarded any amount under this claim No.10. For the purpose of record, I may note that in the arbitration record this document of 20.9.90 seems to be missing but both the parties admitted that this document was duly filed before the Arbitrators. Of course, there cannot be any doubt on this because the Award in various places makes reference to this Minutes of Meeting dated 20.9.1990, though however, in two places instead of referring to the date as 20.9.1990, the date is wrongly typed as 10.9.1990. Accordingly the objection to this claim is sustained and this claim is set aside.

12. The last issue which has been raised before this Court is with respect to the high rate interest @ 12% per annum which has been awarded. It has been held by the Supreme Court in the recent catena of judgments that the Courts should take note of the consistent fall in the rates of interest and must reduce the high rates of interest as granted by the Award. The Supreme Court judgments to this effect are *Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.* 2005 (6) 678, *McDermott International Inc. Vs. Burn Standard Co. Ltd. & ors* 2006 (11) SCC 181, *Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd.* (2006) 7 SCC 700 and *Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra*, 2007 (2) SCC 720, *State of Rajasthan Vs. Ferro Concrete Construction Pvt. Ltd* (2009) 3 Arb. LR 140 (SC). Therefore, considering the facts and circumstances of this case, I think that that the interest @ 9% per annum will

meet the end of justice. I may note that this Court in various judgments has been consistently awarding interest @ 9% per annum simple. In the facts of this case, this is all the more required in terms of aforesaid judgments because the Supreme Court has laid down that if there is a long period of time from the passing of the Award till when the objections are heard and decided by the Court then in view of the length of the period it is all the more necessary that rate of interest should be reduced. In this case, the Award is of the year 1999 and today we are hearing objections in the year 2009. Accordingly, in view of the length of the time also having elapsed, interest @ 9% per annum simple is therefore apt and which is accordingly awarded in the facts and circumstances of the case. Therefore, the interest which is granted by the Award @ 12% is reduced to 9% per annum simple.

13. In case the payment is made by the objector to the non-objector within a period of 90 days from the date of this judgment then the rate of interest shall continue to remain @ 9% from the date of this judgment till payment, if, however, the payment is made after a period of 90 days then the rate of interest from the date of the judgment till the date of payment shall be @ 12% per annum simple. The interest from the date of this judgment till the date of payment is being awarded by this Court in terms of Section 29 of the Arbitration Act, 1940. I may note that I am not changing the period for which the rate of interest is granted by the Award.

14. With the aforesaid observations, the objections are partly allowed. The

Award is made rule of the Court except qua claim Nos. 3,5,8 and 10 as awarded by the Award, are set aside and for rest of the claims the Award is made rule of the Court. The decree be drawn up accordingly. Parties are left to bear their own costs.

December 1, 2009
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VALMIKI J.MEHTA, J