

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. No. 279/1998

12th November, 2009.

DELHI VIDYUT BOARD

..Petitioner

Through: Mr. Gourav Banerjee, ASG with
Ms. Monika Garg, Advocate and
Mr. Arjun Krishnan, Advocate.

VERSUS

SUBHASH CHANDER AND CO.

...Respondent

Through: Mr. Ashok Bhasin, Senior
Advocate with Mr. Shantanu
Rastogi, Advocate and Ms. Marilyn
Abraham, 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

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the Award dated 31.8.1998 passed by the sole Arbitrator. The arbitration proceedings arose on account

of a contract entered into between the parties whereby the respondent was to remove fly ash deposits from certain ash ponds in the petitioner's thermal power plant for being deposited at different sites. The disputes arose on account of various issues such as whether the contractor is entitled to charges for transporting the ash beyond 20 KM. approx., whether the contractor is entitled to charges incurred by him towards idle labour; plant and machinery, loss of profitability on account of closure of the contract and so on.

2. At the outset, I may state that the counsel for the petitioner has confined his arguments with respect to the Claim Nos. 2,5 and 6 dealt with in the Award. Claim No.2 pertains to the claim for payment for additional distance of the disposal site. Claim No.5 pertains to loss due to idle labour/staff/plant and machinery and Claim No.6 is with regard to loss of profitability arising from the pre-mature closure of the contract by the petitioner.

3. The issue which has to be addressed by the Court is with respect to the aspect as to whether for disposal of the fly ash is there is a specified site or an approximate distance to such site, as per the contract. If a specified site or an approximate distance is found in the contract, then, the Award with respect to claim No.2 of charges towards additional distance travelled for disposal of the fly ash, would be correct. However, if the contract does not provide for any specific site or any approximate distance qua the specific site, there will not arise any claim for additional distance for carriage of the fly ash.

4. Mr. Gourav Banerjee, ASG, appearing on behalf of the petitioner has in support of his arguments with respect to the issue that there is no fixed site or even a fixed approximate distance for disposal of the fly ash has taken me through the various contractual conditions in the agreement and more particularly the terms and conditions in the S.C.C. At this stage, I may refer to clause Nos. 4 and 5 of the Special Conditions of Contract. Before I do that I may note that the special conditions of the contract specifically state that whenever there is a conflict between the general conditions of contract and the special conditions, the special conditions shall prevail. Therefore, it is clear that special conditions will prevail over general conditions. Also, it would be relevant for a decision of the subsequent issue that the terms and conditions as found in the final letter of the Award, which was acted upon by the respondent, would become the final contract document between the parties. Clauses 4 and 5 of the special conditions of contract are as under:

“4. The tentative list of sites identified by the Department for disposal of ash shall generally be indicated in the tender/letter of intent. The Department may also identify other sites for disposal of ash, during the course of execution of work. The contractor is required to dispose off the ash at the identified sites as per direction of Engineer-in-charge. However, the contractor shall have option to identify additional sites for dumping at his own end and shall get these locations approved from the Department before commencement of work. Department reserves the right to reject any/all sites so identified by the contractor without assigning any reason. Thus, rate quoted by contractor shall be valid for all leads and lifts. The sites identified by Department shall be filled first as per priorities indicated by the Engineer-in-charge and the site identified by the

contractor shall be filled afterwards. In the sites thus identified by the Department, contractors shall normally fill ash upto optimum capacity of the available dumping ground unless directed otherwise. In the event of one particular site getting full, the contractor shall commence on the next dumping ground as directed by the Engineer-in-Charge. Thus, the contractor has to dispose off/dump ash at number of locations as per exigencies of work/availability of the sites and no claim whatsoever shall be entertained for change in disposal point involving different leads.”

5. The rate quoted by the contractor shall cover for all leads and lifts involved for disposing off the ash in the locations as specified in para (4) above. The rate shall also cover for all operations, such as excavating fly ash from the ash disposal area, loading/unloading and transporting the same to the point of disposal, disposing the top surface of the area after disposal. As the fly ash after excavation is to be disposed off in the low lying areas, any approach required to be made for disposal shall be the contractor liability, and no financial claim whatsoever on this account shall be entertained.”

(Emphasis added)

5. A reference to the conditions 4 and 5 make it more than clear that there is no specific site on which the dumping is to take place. Not only is the list of site tentative, but, it is quite clear from the clauses that the Department may also identify other sites for disposal of ash during the course of execution of the work. There is no reference to any distance with respect to these other sites at which disposal of ash would take place during the execution of the contract. I may, at this stage, mention that the contract between the parties is for disposal of the ash within the entire Union Territory of Delhi as per clause 1. This clause is reproduced hereunder:

“1. The scope of work covers excavating fly ash from any of three or more chambers of ash ponds along Ring Road

between 'Y' shape Rly. Bridge near Bhairon Road crossing and Nizamuddin bridge on river Yamuna and disposing off the ash by closed steel body trucks/dumpers approved by the Department at low lying pockets/dumping ground within Union Territory of Delhi as may be directed by Engineer-in-charge from time to time. The scope of work also includes levelling and dressing of fly ash at the dumping grounds.”

A reading of the clause 1 shows that the scope of the work covers excavating the fly ash from one or more chambers of the ash ponds and disposing of such ash at low lying pockets/dumping ground in the Union Territory of Delhi as may be directed by the Engineer –in-charge from time to time. Therefore, a conjoint reading of clause 1, clause 4 and clause 5 makes it more than clear that not only the contract is for disposal of ash within the Union Territory of Delhi, there is no fixed site which is specified for disposal of such ash, and nor is there specified any fixed or even an approximate distance specified as the lead for the disposal of fly ash. To cap the issue, clauses 4 and 5 in so many words very clearly state that the rates quoted by the contractor shall be valid for all leads that is with respect to all distances and no claims will be entertained for change in the disposal point involving different leads.

6. Mr. Ashok Bhasin, learned senior counsel for the respondent has per contra referred to the Schedule of Quantities (SOQ) to contend that the disposal has to be at a specific site. The relevant portion of this SOQ which is relied upon by Mr. Bhasin is as under:-

“Note:- Tentative sites of disposal:- Vasant Kunj, Dhirpur/Shalimar Bagh or any other site.” (Emphasis added)

Mr. Bhasin has argued that these sites as stated in the SOQ would therefore confine the petitioner to direct disposal of ash by the respondent to such sites only or within leads of such sites only and not for any other leads from the place where fly ash is picked up for disposal.

7. A contract document ordinarily would have provided for the priority of the contractual documents inter se being the notice inviting tender, general conditions of contract, special conditions of contract, the letter of Award and an agreement document which is entered into between the parties. Unfortunately, in this case, the contract is silent as to priority of the documents. I hope, the petitioner will be wiser in future, however in the present, I have to interpret the different terms and conditions as appearing in the contract in a harmonious manner so that the intention of the parties becomes clear from such clauses. I note that in the relevant portion of the schedule of quantities relied upon by Mr. Bhasin that the sites which have been mentioned ends with the expression “or any other site”. This itself, therefore makes it more than abundantly clear assuming any clarification was required even after clauses-1, 4 and 5 of the special conditions of contract, that, there is no fixed site or any fixed distance for disposal of the fly ash under the contract. The disposal as already stated by me is in terms of clause 1 of the SCC was to be at any place in the Union Territory of Delhi and for any

lead/distance. Accordingly, I am not agreeable to the contention which has been very strenuously contended on behalf of Mr. Bhasin on behalf of the respondent.

8. The law with respect to interference with an Award under Section 34 of the Arbitration and Conciliation Act, 1996 is very clear. Ordinarily the courts will not interfere with the Award unless the Award is against the contractual provisions or the award is illegal i.e. against the provisions of the law of the land or is so perverse that it shocks the judicial conscience. This interpretation is now well settled with respect to objections which have been filed under Section 34. Accordingly, in accordance with these parameters of law, I note that the award clearly therefore flies and is totally contradictory to the direct contractual provisions namely clauses 1,4 and 5 of the special conditions. I am of the firm opinion that the clauses in the special conditions of contract in the facts of the present case will prevail over the schedule of quantities/SOQ because the language in the schedule of quantities itself refers to “or any other site”. The same result will also flow from the harmonious construction of all the relevant clauses. Therefore, without doing any violence to the language in schedule of quantities one can safely interpret clauses 1,4 and 5 of the special conditions of contract that as regards the disposal of fly ash there was no fixed place of disposal or any fixed distance. That being the position there cannot lie any claim on behalf of the contractor for disposal of ash beyond any assumed limit which is taken as the fixed contractual distance/lead. This Award of the Arbitrator therefore

being clearly violative of the contractual provisions is liable to be set aside under Section 34. I, therefore, set aside this part of the Award.

9. This takes me to the claim No.6 with respect to the loss of profitability granted by the Award on account of premature closure of the contract by the petitioner. The undisputed facts with respect to this contract are that the contract was awarded vide letter of intent dated 25.7.1994 and as per which the date of commencement of the work was 1.8.1994. The contract was for a period of three months ending on 31.10.1994. It is also an undisputed fact that whereas the original notice inviting tender was for a quantity of 12 lacs cubic metres of fly ash, the letter of intent/letter of Award awarded transportation of only one and half lac cubic meters of fly ash. The contract in question could not be completed by 31.10.1994 and therefore there is an agreed amendment to this contract whereby the contract was extended from 28.12.1994 to 7.2.1995. The contract in question admittedly came to stand still on 16.1.1995 because no other sites were specified by the petitioner for taking the fly ash and the site at Rohini had in the meanwhile completely filled up on 16.1.1995. Once no site was further specified for disposal, therefore, the respondent is entitled to loss of profitability with respect to the closure of the contract. However, the issue is to what extent should the respondent/claimant be allowed the amount of profits with respect to the balance unperformed portion of the contract. The contract in question as stated by me above was for one and half lac cubic metres of fly ash and not for 12 lacs cubic metres of fly ash. The contract

came into being when the petitioner issued the letter of intent dated 25.7.1994 which contains this quantity. The parties have in fact acted on the basis of this letter dated 25.7.1984 which becomes the final contract document between the parties. I may only refer to Section 8 of the Contract Act, 1872 which specifies that the contract between the parties can also be arrived at by means of performing the various terms and conditions of the contract. In this case, it is an undisputed fact that the parties have acted and performed their respective obligations in terms of the letter of intent dated 25.7.1994. Therefore, this is the final contract document between the parties in terms of Section 8 of the Contract Act.

Now if we look at the Award of the Arbitrator what the Arbitrator has done is that he has awarded loss of profitability for the balance portion of the work taking the balance portion of the work not out of the awarded quantity of one and half lac cubic meters but 50% out of the original quantity in the notice inviting tender of 12 lacs. This 50% clearly is erroneous and illegal. This value has been taken by the Arbitrator at Rs.2,50,000,00/-. On this amount of 2,50,000,00/-, the Arbitrator has awarded 5% as loss of profits that is Rs.12.5 lacs. This approach of the Arbitrator is clearly faulty and ex-facie illegal because the contract itself is only of one and half lacs cubic meters and not for 12 lac cubic meters. Out of this contract, of 1.5 lac cubic meters $\frac{2}{3}^{\text{rd}}$ was performed and only $\frac{1}{3}^{\text{rd}}$ of the contract remained. Therefore, if the issue arises of loss of profitability then loss of profitability should have been taken only

with respect to 1/3rd of the contract amount. Since the contract amount for 1.5 lac cubic meters is of the value of Rs.47,00,000/-, 1/3rd of this amount would be approximately 16 lacs. Taking 5% of Rs.16 lacs, the amount of loss of profitability is approximately Rs.80,000/- . That being the position, where the Award has awarded sum of Rs.12.5 lacs, the figure of Rs.80,000/- shall stand substituted . This part of the Award is therefore set aside to the extent that under this head of loss of profitability only Rs.80,000/- is awarded as against Rs. 12.5 lacs.

10. That takes me to the objection raised by Mr. Gaurav Banerjee pertaining to claim no.5. Under this head, the Arbitrator has granted idleness due to labour, establishment, machinery, tools and plants for the period from 19.1.1995 to 20.3.1995. I have also noted that the contract in question was only extended up to 7.2.1995. Once the contract is extended only up on 7.2.1995, there cannot arise any idleness beyond 7.2.1995. Therefore, the idleness charges which have been granted have to be confined from 19.1.1995 (date as per the Award to 7.2.1995 and not up to 20.3.1995. Under this head, the Arbitrator has awarded a sum of Rs.12,500 per day for the period of 59 days. This amount, therefore, instead of being granted for 59 days will now be only granted for 20 days i.e. from 19.01.1995 to 7.2.1995. This part of the award is also set aside and modified to the extent that instead of allowing a sum of Rs.7,35,500/-, I award Rs.2,50,000/- under this head.

11. Finally, that leaves me with regard to the issue of interest. The Arbitrator has awarded interest at the rate of 18% per annum. I may note that the Supreme Court in the line of recent judgments reported as *Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and others*, 2005 (6) SCC 678, *McDermott International Inc. v. Burn Standard Co. Ltd. and others*, 2006 (11) SCC 181, *Rajasthan State Road Transport Corporation v. Indag Rubber Ltd.*, (2006) 7 SCC 700 & *Krishna Bhagya Jala Nigam Ltd. v. G.Harischandra*, 2007 (2) SCC 720 and *State of Rajasthan Vs. Ferro Concrete Pvt. Ltd.* has held that in view of the changed economic scenario and the consistent fall in the rates of interest, the courts ought to take note of the same and must necessarily reduce the interest which is granted under the Award. Accordingly, being bound by the mandate of Supreme Court, I feel in the present facts and circumstances, the interest at the rate of 9% per annum simple will serve the ends of justice. Thus wherever the interest of 18% appears in the Award the same shall be read as 9% p.a simple.

12. Ordinarily, I would have imposed costs in terms of paragraph para 37 of the judgment of the Supreme Court in *Salem Advocate Bar Association Vs. Union of India*, (2005) 6 SCC 344 which specifies that it is high time that the court should award actual costs and not nominal costs. However, in this case, since part of the objections have been accepted and part of the Award has been sustained, I feel that in the interest of justice, considering all the facts and circumstances of the

present case, will be well served if the parties are left to bear their own costs.

13. With the aforesaid observations petition under Section 34 is disposed of with the modifications with respect to claim Nos. 2,5 and 6 and the reduced rate of interest as stated above.

VALMIKI J.MEHTA, J

November 12, 2009

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