

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) No. 2953/2008

Date of pronouncement: 4th February, 2009

Varindera Constructions Ltd. Petitioner
Through : Mr. Arun Khosla and Mr. S. Kakkar, Adv.

Versus

Union of India through Director
General Married Accommodation Project Respondents
Through : Mr. K.K. Sharma and Mr. Mukesh
Anand, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

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| 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 the Digest? | Yes |

G.S. SISTANI, J.

1. The Present petition has been filed under Article 226 of the Constitution of India against the alleged arbitrary action of the respondent (Union of India through Director General, Married Accommodation Project, Kashmir House, Rajaji Marg, New Delhi) in rejecting the claim of the petitioner for payment towards additional expenses of the petitioner on account of the exorbitant hike in minimum wages. And further in rejecting the petitioner's request for reference of the dispute to arbitration.

2. The factual matrix as culled out from the petition is. The petitioner herein (M/s Varindera Constructions Ltd.) is a Public Limited Company and is in the business of civil construction. The parties herein entered into Works Contracts (4 Nos.) for the "PROVISION OF MARRIED ACCOMMODATION AT HISSAR, being Packages II to V in the aggregate lump sum of Rs.188,62,50,505/- (approximately Rs.189 crore), the labour content whereof is approximately [twenty five percent] (25%)". Two letters of acceptance issued by the respondent are dated 01.06.2006 and the remaining 2 letters are dated 02.02.2007.
3. After execution of the agreements, on 27.06.2007, the Labour Department of the Haryana Government notified an increase in the minimum wages for unskilled labourers from the prevailing wage of Rs. 95.55 per day to Rs. 135/- per day, thus implying an increase of about forty two percent (42%). Aggrieved by the notification dated 27.06.2007, issued by the Haryana Government, the petitioner approached the respondents with a request for price amendment of the contract on the ground that the said notification has resulted in an increase in the minimum wages for unskilled labourers, beyond the normal anticipated increase and that this had put undue burden on the petitioner. The petitioner wrote letters dated 30.09.2007, 20.10.2007 and 22.12.2007. In response, the respondents rejected the application of the petitioner and

relied upon the 'Special Conditions of the Contract', more particularly Clause 19 as by virtue of which the contractor was not entitled to any escalation or re-imbursement. The respondent also rejected the request of the petitioner for appointment of an arbitrator on the basis of the agreement signed between the parties and by virtue of which the arbitration could not be invoked during the pendency of the contract and also that the dispute was not an arbitrable dispute.

4. It is contended by learned counsel for the petitioner that the 'General Conditions of Contract' have an in-built contradiction of terms in as much as while Article 19 thereof bars any claim of escalation, Article 25 stipulates that "if after the last date of submission of tenders, there occurs any change and/or any ordinance is imposed by Central Government, State Government/any Statutory Body and as a consequence of this, if Contractor is required to pay to or claim any adjustment/reimbursement on this account, contractor shall submit his claim along with supporting document to substantiate the claim."
5. Learned counsel for the petitioner submits that the action on part of the respondent is also arbitrary in view of the fact that in a similar agreement executed with one M/s. Friends Construction, the respondent has agreed to refer the matter for arbitration during the pendency of the contract. Learned

counsel for the petitioner has during the course of this hearing, placed reliance upon a letter numbered 10 and more particularly paragraphs 2 & 4 of this letter No.10, and in which condition No.70 of IAFW-2249 has been amended. The said paragraphs read as under:

“2. Condition 70 of IAFW-2249 stipulates that unless both parties agree in writing, reference to arbitration shall not take place until after the completion of works or alleged completion of works or termination of the contract; but in the event of cancellation of the contract due to contractor’s default, reference to arbitration shall not take place until alternative arrangements have been finalized to get the works completed by other Agency.

4. Some disputes arising out of interpretation of the provisions in a contract, however, may go to the very root of the contract and involve a substantial financial effect, which if not settled expeditiously may be cited by the Contractor as a reason for his inability to progress the work as scheduled. In such cases, which should be exceptional, in the interest of timely completion of the work, Accepting Officers may agree to refer the disputes to arbitration during currency of the contract, if so requested for by the Contractor. However, before agreeing for reference to arbitration during currency of a contract, as aforesaid, a specific written undertaking should be obtained from the contractor to the effect that such reference to arbitration during currency of the contract i.e. prior to completion of work, is without prejudice to any or all the rights of the Government under the contract.”

6. Mr.Khosla, learned counsel for the petitioner further submits that the present case is fully covered by a decision of the Apex Court in the case of **Food Corporation of India Vs. AM Ahmed & Co. and Anr.** reported at **2006 (4) Arbitration Law Reporter 155 (SC)**. Learned counsel for the petitioner

has relied upon paragraphs 10 and 32 of this Judgment and which are reproduced below:

“10. In our opinion, the argument of the learned senior counsel for the FCI that there is no clause in the contract providing for escalation to reimbursement the expenses and, therefore, the arbitrator had exceeded his jurisdiction has no substance. The issue of jurisdiction of the arbitrator to go into the claim of the claimants towards compensation and neutralization of the extra expenditure incurred on account of statutory wages revisions had already concluded in the earlier proceedings arising out of the application filed by the claimant firm under Section 20 of the Arbitration Act for appointment of the arbitrator. The FCI in the said proceedings specifically contended that there was no escalation clause in the contract, the claim of the claimants for compensation on account of wage revision should not be referred to arbitration and that the said claim was non-arbitrable. However, the learned Subordinate Judge, Tuticorin by order dated 16.06.1987 in OP No.49 of 1986 rejected the said contention holding that the said claim was arbitrable. On appeal filed by the FCI before the High Court, the High Court also confirmed the same by order dated 01.03.1989 in CMA No.291 of 1987. This court also dismissed the Special Leave Petition No.5213 of 1989 filed by the FCI by order dated 05.05.1989. Thus, the FCI is barred by res judicata from raising the same issue again in the present proceedings.

32. Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The arbitrator by awarding wage revision has not misconducted himself. The award was,

therefore, made rule of the High Court, rightly so in our opinion.”

7. Thus the broad arguments of learned counsel for the petitioner are: although Clause 19 of the Special Conditions of the Contract does not provide for escalation or reimbursement, the petitioner is still entitled to escalation and reimbursement in view of the increase in the minimum wages of unskilled labourers from Rs. 95.55 per day to Rs. 135 per day, vide notification dated 27.06.2007 issued by the Labour Department, Government of Haryana. Learned counsel for the petitioner submits that even otherwise also the escalation must be allowed on account of the fact that the prices of material and wages has undergone an exorbitant statutory increase and which could not have been contemplated by the parties. Learned counsel submits that the escalation is much more than what the petitioner could have factored in his bid when tendered. The second leg of the argument of the petitioner is that even if as per Clause 19 no escalation was to be allowed, yet the petitioner should be allowed to raise the question of escalation before an Arbitrator and that too during the period of the contract. Learned counsel for the petitioner submits that this is a fit case where the respondent should agree to the appointment of an arbitrator before the completion of the contractual work. Learned counsel prays that this court:

- “(1) issue a writ in the nature of certiorari or any other writ or direction quashing the Respondent’s letter dated 27.2.2008 rejecting the Petitioner’s claim for increased labour costs arising out of the exorbitant statutory increase in minimum wages;
- (2) issue a writ in the nature of certiorari or any other writ or direction quashing the Respondent’s letter dated 25.3.2008 rejecting the Petitioner’s request for reference to arbitration of disputes;
- (3) issue a writ in the nature of mandamus or any other writ, order or direction requiring the Respondent to make payments towards escalation resulting from the statutory increase in minimum wages after the execution of the subject contracts

OR ALTERNATIVELY

refer for arbitration the dispute related to escalation resulting from the statutory increase in minimum wages after the execution of the subject Contracts to the appropriate authority for adjudication within a time bound one month frame.

- (4) issue a writ in the nature of certiorari or any other writ or direction directing the Respondents to pay the costs of this petition.”

8. The present petition has been opposed by learned counsel for the respondent on the ground that this petition pertains to a purely commercial and contractual relationship between the parties and thus this Court would not interfere in the same. Learned counsel for the respondent submits that reliance of the petitioner on Clause 25 of the ‘Special Conditions of the Contract’, is misdirected as Clause 25 pertains to ‘Octroi, Sales Tax and other Duties’. Furthermore there is no similarity between the contract entered into with

M/s. Friends Construction in as comparison to that entered with the petitioner. Learned counsel for the respondent submits that the tender of M/s. Friends Construction was to be based on *“drugs specification, IAFW-2249 and IAFW-2159A (Revised) with schedule ‘A’ (List of works) to be pre-priced by MES.”* On the other hand, the tender of the petitioner was to be based on *[d]rawing, specifications, conditions with schedule. ‘A’ Section II, III, IV, V, VI, VII and X are pre-priced by the Deptt. and Schedule ‘A’ Section I, VIII & IX to be quoted by the tenderer.”* Learned counsel for the respondent submits that a bare reading of the contract executed with the M/s. Friends Construction would show that as per the Clause mentioned at serial page No.127 under the Heading *“Reimbursement/ Refund of variation in prices of wages of labour”*, it was agreed that *“[i]ncrease/decrease in price consequent on variation in wages of labour shall be adjusted on the basis stipulated hereinafter irrespective of actual variation in the prices of wages of labour to the contractor”*, whereas, the corresponding Clause with respect to variation in prices entered into with the petitioner herein is diametrically opposite inasmuch as that in the case of the petitioner, it had been agreed that no escalation or reimbursement shall be made to the contractor on account of any increase in the price of material, fuel and wages of labour. Learned counsel for the respondent submits that Clause 19 of the ‘Special Conditions

of the Contract' is clear and explicit and both parties are bound by the same. Clause 19 of the 'Special Conditions of the Contract' reads as under:

"RE-IMBURSEMENT / REFUND OF VARIATION IN PRICES"

No escalation, reimbursement what so ever shall be made to the contractor for increase in prices of materials and fuel and wages of labour which the contractor may have to incur during execution of the work on any account. The contractors shall quote their rates accordingly."

9. Learned counsel for the respondent submits that this Clause is very wide in its import and stresses that this Clause takes into account all the factors including increase in price of material, fuel and wages of labour. The concluding portion of this Clause says, the contractor shall quote their rates accordingly. Even otherwise also in the absence of any challenge to Clause 19 of the contract, the parties are bound by it. Learned counsel submits that being purely a commercial transaction, the petitioner and the respondent entered into the agreement with open eyes and neither party can ask for an increase nor ask for reference of the dispute to arbitration. Learned counsel relies upon Clause 60 of the 'General Conditions of the Contract' which deals with the appointment of an arbitrator. The same reads as under:

"60. **Arbitration:** All disputes, between the parties to the contract (other than those for which the decision of the DG MAP/ CCE MAP or any other person is by the

contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration serving officer having degree in Engineering or equivalent or having passed Final/Direct Final Examination of Sub-Division of Institution of Surveyors (India) recognized by the Govt. of India to be appointed by the Engineering in Chief.....

Unless both parties agree in writing, such reference shall not take place until after the completion of the Works or termination or determination of the Contract under Condition Nos.49 and 50 hereof.”

Learned counsel for the respondent submits that the dispute with respect to escalation is not an arbitrable dispute and therefore, respondents cannot accede to the demand of the petitioner for reference of the same either during the pendency of the contract or even after its conclusion.

10. Learned counsel for the respondent has also placed reliance on Clause 6.3 of the ‘Special Conditions of Contract’, which deals with the payment of minimum wages, wherein there is an express bar on the contractor to make any claim on account of payment of wages. Clause 6.3 reads as under:

“6.3 The contractor shall have no claim whatsoever, if on account of local factor and/or regulations, he is required to pay the wages in excess of minimum wages as described above during the execution of work.”

Learned counsel for the respondent submits that the petitioner has no merit in its case.

11. I have heard learned counsel for the parties and given my thoughtful consideration to the matter. In the case of **Food Corporation of India** (*supra*), dispute had arisen between the parties. Although there was no escalation clause in the agreement yet the dispute was referred to an arbitrator and ultimately an award was made in favour of the contractor. The Food Corporation of India (FCI) thereafter filed objections to the award which were dismissed. Herein it would be useful to note that in **Food Corporation of India** (*supra*), the contractor had filed an application under Section 20 of the Arbitration Act, 1940 for appointment of an arbitrator. The Food Corporation of India had specifically contended that there was no escalation clause in the contract and that the claim for compensation on account of wage revision should not be referred to the arbitrator. However, the subordinate judge rejected this contention. On an appeal filed by the Food Corporation of India, the High Court confirmed the order and the Supreme Court had also dismissed the SLP. Thereafter, the Food Corporation of India filed a civil appeal and raised objections before the Supreme Court, and also raised the question 'whether in the absence of any clause in the contract providing for escalation, the dispute could have been referred to arbitration? And also that the claim was non-arbitrable? The Supreme Court had observed that this question was barred by *res judicata* in the present proceedings. Drawing an analogy

from these facts, learned counsel for the petitioner submits that the Supreme Court has upheld that a dispute with respect to the escalation can be referred to an arbitrator.

12. However, I am unable to agree with the submission of learned counsel for the petitioner as in my considered opinion the facts of the case herein before me are completely different from that of the **Food Corporation of India** (*supra*). In the latter case, there was no clause in the contract providing for escalation or reimbursement, where as in the present case, Clause 19 puts an express bar on any escalation or reimbursement on account of the increase in the price of material, fuel and wages of labour. So much so, that in the last portion of Clause 19, the contractors were specifically asked to quote their rates accordingly. Thus the contractor was well aware that in future if there would be any escalation he would not be entitled to any reimbursement, and that he must quote his rates accordingly. If the contractor was unable to anticipate any increase in the prices, then the contractor cannot shift the burden of his fault on the respondent.
13. In paragraph 32 of the judgment in **Food Corporation of India** (*supra*), the Apex Court has also noticed that the arbitrator while dealing with the dispute of escalation had given a finding that the delay in execution of the contract was due to the conduct of the FCI and thus FCI was liable for the consequences of the delay namely, increase in statutory

wages. However, the present case does not involve such a situation and neither has the increase been attributed on account of any delay on the part of the respondent. In so far as the contention of learned counsel for the petitioner is concerned that in a similar agreement executed by the respondent with one M/s. Friends Construction, the respondent has agreed to refer the matter for arbitration during the pendency of the contract, I find that the agreement executed with M/s. Friends Construction is distinguishable from that entered with the petitioner. As per the material on record, the terms of the contract agreed between the respondent and M/s. Friends Construction was that *“[i]ncrease/decrease in price consequent on variation in wages of labour shall be adjusted on the basis stipulated hereinafter irrespective of actual variation in the prices of wages of labour to the contractor”*, whereas, in the case of the petitioner, it had been agreed that, *“[n]o escalation, reimbursement what so ever shall be made to the contractor for increase in prices of materials and fuel and wages of labour which the contractor may have to incur during execution of the work on any account. The contractors shall quote their rates accordingly.”* Thus the two contracts are materially distinguishable. Furthermore, I find force in the submission of learned counsel for the respondent that Clause 25 pertains to ‘Octroi, Sales Tax and other Duties’ and that there is no contradiction between Clause 19 and Clause 25 of

the Special Conditions of the Contract. The latter clause is reproduced herein below:-

“25. Octroi Sales Tax and Other Duties

The tenderer's rates shall be deemed to include all duties, such as Octroi, Sales Tax, Excise and other taxes as referred in Condition 12 of DG MAP General Conditions of Contracts and shall also include State Govt. Sales tax on Works Contracts payable under respective Statutes according to the aforesaid Condition (46 Amendement Act-10982). Any other conditions stipulated by the tenderer regarding Sales tax on Works Contracts will not be considered and such tender shall be liable for rejection. “However, if after the last date of submission of tenders, there occurs any change and/or any new ordinance is imposed by Central Government, State Government/any Statutory Body and as a consequence of this, if Contractor is required to pay to or claim from such be adjustment/reimbursement on this account, contractor shall submit his claim along with supporting document to substantiate the claim.”

14. Thus taking into consideration that Clause 19 of the Special Conditions of the Contract lays a complete bar on escalation or reimbursement on any account whatsoever, I find no infirmity in the stand of the respondent. I also do not find the action of the respondent in not agreeing for appointment of an arbitrator during the pendency of the contract, to either as being unjust or arbitrary, in view of Clause 60 of the General Conditions of the Contract agreed to between the parties. As per this arbitration clause, unless both the parties agree in writing, a reference cannot be made for arbitration until after the completion of the works or termination or determination of the contract. When the parties are *ad-idem* to the terms of the

contract, it is not for this Court to re-write the agreement which was executed between the parties. Both the parties had entered into the contract with open eyes and cannot at this stage find faults with the contract. I am fortified in my view by a decision of the Apex Court in the case of **Puravankara Projects Ltd. v. Hotel Venus International** reported at **(2007) 10 SCC 33** and which observed:

“28. In *Har Shankar v. Dy. Excise & Taxation Commr.*¹ the case of a bid with full knowledge was considered. It was observed as follows: (SCC pp. 745-46, paras 15-16)

‘15. Learned counsel for the respondents raised a preliminary objection to the maintainability of the writ petitions filed by the appellants to the grant of reliefs claimed by them. He contends that such of the appellants who offered their bids in the auctions did so with a full knowledge of the terms and conditions attaching to the auctions and they cannot, by their writ petitions, be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids. This objection is well founded and must be accepted.

16. Those interested in running the country liquor vends offered their bids voluntarily in the auctions held for granting licences for the sale of country liquor. The terms and conditions of the auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government’s acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders

¹ (1975) 1 SCC 737

were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.'

31. In *New Bihar Biri Leaves Co. v. State of Bihar*² it was observed at para 48 as follows: (SCC p. 558)

'48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbat non reprobat* (one who approbates cannot reprobate). This principle, though originally borrowed from Scots law, is now firmly embodied in English common law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (per Scrutton, L.J., *Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co.*³; see *Douglas*

² (1981) 1 SCC 537.

³ (1921) 2 KB 608 (CA).

*Menzies v. Umphelby*⁴, AC at p. 232; see also *Stroud's Judicial Dictionary*, Vol. I, p. 169, 3rd Edn.).’”

Furthermore in the case of **Asgar S. Patel v. Union of India** reported at **(2000) 5 SCC 31**, the Supreme Court held:

“When the parties enter into a clear, unambiguous and express contract creating mutual rights and obligations, the parties are bound by it and the extraordinary jurisdiction of the High Court under Article 226 of the Constitution which is of a discretionary nature cannot be allowed to be utilised for enforcing an obligation in departure from the terms of the agreement.”

15. Having regard to the terms of the contract agreed between the parties and for the reasons aforesaid, no relief can be granted to the petitioner. The petition is accordingly dismissed, with no order as to costs.

G.S. SISTANI, J.

February 4th, 2009
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⁴ 1908 AC 224.