

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

+ **F.A.O. (OS) NO.455 OF 2008 & C.M. NO.15951 OF 2008**

% Reserved on : 11th August, 2009
Pronounced on : 17th August, 2009

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant
Through: Mr. Sandeep Sethi, Sr. Advocate
with Ms. Padma Priya & Mr. Sumit
Gahalawat, Advocates.

versus

M/S. AFCONS INFRASTRUCTURE LTD. Respondent
Through: Mr. V.P. Singh, Sr. Advocate with
Mr. Amit Dhingra, Mr. Anil
Bhatnagar & Mr. Manu
Seshadhari, Advocates.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE NEERAJ KISHAN KAUL

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

J U D G M E N T

NEERAJ KISHAN KAUL, J.

1. The present appeal arises out of the impugned judgment dated 2nd July, 2008 passed in O.M.P. No.123 of 2007 whereby the objections of the appellant to the award dated 13th November, 2006 passed by the Arbitral Tribunal were dismissed.

2. The only issue which came up for consideration before the learned Single Judge and was urged by the parties was whether the cess imposed by the Government of Karnataka after the contract came into existence was to be borne by the respondent/contractor or such cess could be passed on to the appellant/employer. The

Arbitral Tribunal 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 appellant/employer to the respondent/contractor. This finding of the Arbitral Tribunal was challenged by the appellant before the learned Single Judge. It was *inter alia* the appellant's case that only Clause 45.1 of the General Conditions of Contract (GCC) was relevant inas much as it is a direct provision dealing with taxes. It was urged on behalf of the appellant that the Arbitral Tribunal's reliance on Clause 32.1 of the GCC was misplaced. It will be useful to set out Clauses 45.1 and 32.1 as under :-

“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.”

“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.”

3. It was submitted on behalf of the respondent before the learned Single Judge that the scope of interference by a court in such matters was extremely restricted and limited. It was urged that the court had no jurisdiction to interfere with mere errors of fact or law. Further on behalf of the respondents it was argued that an

interpretation placed by the Arbitral Tribunal on the terms of the contract, if plausible, cannot be interfered with by the court. The learned senior counsel for the respondent had argued before the learned Single Judge that both the said Clauses 45.1 and 32.1 were duly considered by the Arbitral Tribunal and after considering the entire material, the Arbitral Tribunal 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.

4. The bid of the respondent/contractor was accepted on 19th July, 2001 and the agreement was entered into on 30th August, 2001. During the progress of the work, the Government of Karnataka introduced the Karnataka Sales Tax and Certain Other Laws (Amendment) Act, 2004 (herein after referred to as ‘the Amendment Act’) with effect from 29th January, 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. The respondent/contractor informed the Team Leader vide their letter dated 26th July, 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.

The Engineer rejected the respondent's/contractor's request stating that Clause 32.1 had no relevance or application on the issue of subsequent legislation. The respondent/contractor not being satisfied with the Engineer's decision referred the dispute to the DRE in terms of Clause 4.1 of the Conditions of Contract by their letter dated 28th September, 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.”

5. Being dissatisfied with the decision of the DRE, regarding reimbursement of cess to the respondent, the appellant submitted its claim before the Arbitral Tribunal for setting aside the DRE's decision as regards the said dispute No.2.

6. The finding of the Arbitral Tribunal on this issue were as follows :-

“Clause 47 provides for price adjustment as per sub-clause 47.1 read with item 28 of Contract Data. Clause 47.2 of the conditions of contract is a deeming clause by which the bidders are required to cover the rise and fall of the cost in the rates quoted, to the extent fully not covered by this clause or other clauses of this contract.

If anything is omitted or not covered under any of the provisions of contract for price adjustment, it is deemed to have been included in the rates quoted in BOQ and the bidder will

not get separate price adjustment. This clause cautioned the bidder to analyse various clauses relating to price adjustment/increase in contract price, while quoting rates in the bid. **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 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.

If a view is taken that the two clauses are incongruous to one another, then the rule of contract proferentum comes into the play and such clause should be strictly construed against the Employer, since the contract document has been drafted by the Employer.

Clause 47.2. The Employer had referred circular dated September 1, 2003 regarding **Policy matter – Administration / Finance** (54/2003) regarding Irregular payment of Royalty/Taxes pertaining to clause 70.8 of the contract of Gurgaon-Kotputli project wherein, audit has pointed out that no separate payment was required to be made under Clause 70.8 if it was already covered under price adjustment formula. In the present case there is no dispute between the parties on the fact that Royalty/cess are not included in the wholesale price index (Exhibit C-11). Hence, the Tribunal holds that the reimbursement of the actual payment made by the contract on these items, is justified.”

7. The learned senior counsel Mr. Sandeep Sethi appearing for the appellant also placed reliance on Clauses 47.1 and 47.2 of the agreement which read as follows :-

“47 Price Adjustment

This Clause is applicable only for those projects with completion period of more than one year.

47.1 Contract price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures and as per formula given in the contract data:

(d) The price adjustment shall apply for the work done from the start date given in the contract data upto end of the initial intended completion date or extensions granted by the Engineer and shall not apply to the work carried out beyond the

stipulated time for reasons attributable to the contractor.

- (e) The price adjustment shall be determined during each month from the formula given in the Contract Data.
- (f) Following expressions and meanings are assigned to the work done during each month.

R = total value of work done during the month. It would include the value of materials on which secured advance has been granted, if any, during the month, less the value of materials in respect of which the secured advance has been recovered, if any during the month. It will exclude value for works executed under variations for which price adjustment will be worked separately based on the terms mutually agreed.

47.2 To the extent that full compensation for any rise or fall in costs to the Contractor is not covered by the provisions of this or other clauses in the contract, the unit rates and prices included in the contract shall be deemed to include amounts to cover the contingency of such other rise or fall in costs.”

8. He further urged that the relevant clauses which were applicable were the aforesaid clauses and not clause 32.1. On being asked whether a specific challenge in the present appeal had been taken to the fact that arguments were addressed on clauses 47.1 and 47.2 before the learned Single Judge and the learned Single Judge had not dealt with the same, the learned senior counsel could not point to any such averment in the grounds of appeal.

9. In any case, the Arbitral Tribunal has dealt with all the relevant clauses of the contract including Clauses 47.1 and 47.2. The learned Single Judge has rightly held that the present case was not one where the Arbitral Tribunal had ignored the terms of the contract. The learned Single Judge, in our view, correctly observed that 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 was not acceptable to the appellant, the same was no ground for interference with the Award. The learned Single Judge thereafter correctly held that 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 contract. The learned Single Judge was right, in our view, in holding that in order to justify an interference with the Award, the same should be so patently illegal that it goes to the root of the matter. The learned Single Judge correctly held that for the court to interfere, 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. The learned Single Judge correctly concluded that the Award in question did not contain any such patent illegality, much less an illegality which went to the root of the matter. The interpretation of Clauses 32.1, 45.1 and other clauses of the agreement by the Arbitral Tribunal was a plausible one and no interference was called for. The learned Single Judge placed reliance and rightly so on several decisions of the Supreme Court including

the judgment of the Supreme Court in *Mcdermott International Inc. Vs. Burn Standard Company Limited and Others*; 2006 (11) SCC 181.

10. The scope of interference by the court in the interpretation of a contract by an Arbitrator has come up for consideration in several cases. In *Madhya Pradesh Housing Board Vs. Progressive Writers and Publishers*; AIR 2009 Supreme Court 1585 it was held as under :-

“Interpretation of a contract, it is trite, is a matter for the arbitrator to determine. Even in a case where the award contained reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or award is based on wrong proposition of law. An error apparent on the face of the records would not imply closed scrutiny of the merits of documents and materials on record. ‘Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering’. [see *Sudarsan Trading Co. Vs. Government of Kerala*; (1989) 2 SCC 38 and *State of U.P. Vs. Allied Constructions*; (2003) 7 SCC 396].”

11. It would be also useful to refer to the observations of the Division Bench of the Delhi High Court in *Delhi Development Authority Vs. Wee Aar Constructive Builders & Anr*; AIR 2005 Delhi 140 as under :-

“When the parties have chosen a forum to refer their disputes to be adjudicated not by Civil Court by filing a suit, this Court while exercising appellate power will not substitute its opinion with that of the Arbitrator. If the clause in the contract is open to two plausible interpretations, it is legitimate for the Arbitrator to accept one or the other available interpretation and even if the Court may think that the other view is preferable, the Court will

not or should not interfere with such plausible view taken by the Arbitrator.”

12. Reliance may also be placed on the judgment of the Supreme Court in *BOC India Limited Vs. Bhagwati Oxygen Limited; 2007 (9) SCC 503* wherein the court held that when the Arbitrator had taken a plausible view on the interpretation of contract, it was not open to the court to set aside the Award on the ground that the Arbitrator had misconducted himself in the proceedings and, therefore, the Award was liable to be set aside. The Supreme Court in the said case relied on the decision of the Supreme Court in *Indu Engineering and Textile Limited Vs. Delhi Development Authority; (2001) 5 SCC 691* to observe that when a plausible view had been taken by the Arbitrator and unless the Award of the Arbitrator was vitiated by a manifest error on the face of the award or was wholly improbable or perverse, it was not open to the court to interfere with the Award.

13. Reference may also be made to the decision of the High Court of Delhi in *Bharat Heavy Electricals Limited Vs. Globe Hi Fabs Limited; 2004 (3) Arb. LR 636 (Delhi)* wherein the court held as follows:-

“From the decisions rendered under the Arbitration Act, 1940 as well as under Act of 1996 by the Supreme Court it is apparent that if an arbitrator has interpreted a clause in an agreement in a particular manner and has taken a decision which is a possible view, it is not permissible for the Court to substitute its own evaluation or the conclusion of law or fact. When the parties have chosen a forum to refer their disputes to be adjudicated not under a

common law forum or under a statute by filing a suit, Court while exercising appellate power will not substitute its opinion with that of the arbitrator. If the clauses in the contract are open to two plausible interpretations, it is legitimate for the arbitrator to accept one or the other available interpretation and even if the Court may think that the other view is preferable, the Court will not or should not interfere with interpretation of the Arbitrator.”

14. To the same effect are the observations and findings of the Delhi High Court in *Union of India Vs. Bharatiya Vehicles and Engineers Company Limited* in FAO (OS) No.138 of 1998 decided on 12th February, 2009 which reads as follows :-

“Firstly, we may state that the issue raised is pure and simple a question of interpretation of the terms of the contract. It is the jurisdiction of the Arbitrator to interpret the agreement, and unless it can be shown that the interpretation given by the Arbitrator is not at all a plausible interpretation, the court would not interfere with the same, merely because the court may have interpreted the agreement differently. If the interpretation given by the arbitrator is plausible, the same shall not be interfered with by the Court.”

15. In the light of the law discussed hereinabove and the judgments relied on by the learned Single Judge, in our view, the learned Single Judge was right in concluding that the interpretation of the contract as determined by the Arbitral Tribunal was certainly not one which could 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 Section 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. The learned Single Judge was right in concluding that though the effect of taxes and increase in any 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 of either party. The Arbitral Tribunal had also held that Clause 45.1 has to be read along with Clause 32.1 and it does not supersede Clause 32.1. The Arbitral Tribunal further held that introduction of cess by Karnataka Government was made subsequent to date of start of this contract and is covered under future events under Clause 32.1. The view of the Arbitral Tribunal which was upheld by the learned Single Judge was definitely a plausible view and thus, warrants no interference.

16. In the light of the above discussion, there is no merit in the appeal. Accordingly, the appeal is dismissed. The pending application stands disposed of as well.

**NEERAJ KISHAN KAUL
[JUDGE]**

**MUKUL MUDGAL
[JUDGE]**

**AUGUST 17, 2009
'AA'/RS**