

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

+ **OMP No.573/2008**

**Date of decision: 11<sup>th</sup> August, 2009**

**The Union of India & Anr.** ....Petitioners

Through: Mr. Ambar Qamaruddin, Advocate

## Versus

**M/s. Raj Construction Company** .... Respondent

Through: Ms. Deepika Jain, Advocate

***CORAM :-***  
**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

- |    |                                                                       |    |
|----|-----------------------------------------------------------------------|----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not?                                | No |
| 3. | Whether the judgment should be reported in the Digest?                | No |

**RAJIV SAHAI ENDLAW, J.**

1 The petitioner Union of India has preferred this petition under  
Section 34 of the Arbitration Act, 1996 with respect to the arbitral  
award dated 5<sup>th</sup> July, 2008. Notice of the petition was issued and  
reply has been filed by the respondent. Though the arbitral award  
has not been requisitioned and is not before this court but the  
counsel for the petitioner has submitted that the arbitral record is  
not necessary for adjudication of this petition and the points urged in

this petition are limited and the petition can be taken up for hearing. The counsels for the parties have been heard.

2 The respondent was awarded the work for construction of Model Station Building at Ambala Cantt. vide letter dated 17<sup>th</sup> October, 2001 of the petitioner; the value of the contract was Rs.21,36,103/- and the work was required to be completed by 16<sup>th</sup> April, 2002. A formal contract was executed on 9<sup>th</sup> January, 2002. The admitted position is that only 50% of the site was provided by the petitioner to the respondent on 15<sup>th</sup> January, 2002. Upon the respondent digging the earth for foundation pits, sub soil water starting oozing and accumulated in the pits. The Engineer Incharge of the petitioner could not suggest any solution and first an attempt was made to bail out the water which had accumulated but the sub soil water continued oozing out. The petitioner then approached experts at Regional Engineering College, Kurukshetra who suggested pile foundation design to be opted in lieu of the design earlier opted by the petitioner. The petitioner then floated two separate pile foundation contracts which also came to be allotted to the respondent. The work of pile foundation under the subsequent contracts could be completed only on 15<sup>th</sup> November, 2002 and during which period the work under the original contract aforesaid remained suspended.

3 After the petitioner had made payments to the respondent under the original contract also and had refunded the security deposit of the respondent, the respondent made the claims on account of prolongation of work under the original contract, owing to increase in rates of material, labour, steel etc. in the interregnum and which delay the respondent claimed was not attributable to it.

Upon the petitioner not accepting the said claims and also not appointing the arbitrator as demanded by the respondent, the respondent filed an Arbitration Application No.308/2005 in this court under Section 11(6) of the Act and which came to be allowed on 4<sup>th</sup> May, 2006 and a retired Judge of this court appointed as the arbitrator.

4 The respondent had made a claim of Rs.29,33,967/-. The arbitrator,

- (i) negated the plea of the petitioner of applicability Section 80 of the CPC holding the same to be not applicable to arbitration;
- (ii) also negated the plea of the petitioner of the respondent being not entitled to prefer the claim for the reason of having received the payments under the contract in full and final settlement and having given a no claim certificate – the arbitrator held that the question whether the no claim certificate was signed voluntarily or not was arbitrable as held in ***Union of India Vs. L.K. Ahuja and Company*** AIR 1988 Supreme Court 1172; found that the no claim certificate in this case was on a printed form required to be submitted for receiving the final payment; that it was signed mechanically and in fact contained several blanks; that the petitioner had admitted that as per its practice before final bill for payment is processed, the contractor is required to sign the said certificates. The arbitrator thus inter alia held that no claim certificate in the present case to have been not signed voluntarily and held the respondent entitled to maintain the claim;

- (iii) negated the plea of the petitioner of the respondent being not entitled to the claim for the reason of allied contracts of pile foundation having also been awarded to it; the arbitrator held that those contracts were separate from the contract whereunder the claim had been made;
- (iv) held that the petitioner has extended the time under the original contract without imposing any condition that the respondent would not be entitled for losses he may suffer on account of escalation;
- (v) held that the delay was attributable to the petitioner in the circumstances aforesaid and the respondent was not required to test for the sub soil water before accepting the contract and the same was to be done by the petitioner;
- (vi) applied the Hudson's Formula for calculating the losses suffered by the respondent owing to the delay;
- (vii) negated the plea of the petitioner of the respondent being required to prove actual loss, on the basis of the dicta of the Supreme Court in ***McDermott International Inc. Vs. Burn Standard Co. Ltd.*** 2006 (11) SCC 181 and the provisions of Sections 55 and 73 of the Contract Act;
- (viii) Applying the said formula the arbitrator found the entitlement of the respondent to damages in the sum of Rs.10,26,975/- only;
- (ix) besides the aforesaid award, the arbitrator also allowed Rs.60,000/- in lump sum to the respondent for pumping out the water which had accumulated.

All the other claims of the respondent were disallowed. The arbitrator has also awarded interest to the respondent at 12% per annum from the date of the award till realization, besides costs of arbitration of Rs.4.50 lacs.

5 The counsel for the petitioner/objector has raised only two contentions. Firstly it is contended that the award upholding the claims inspite of the no claim certificate is contrary to contract. Secondly, the applicability of the Hudson's Formula is controverted. It is urged that the respondent had in its pleadings not made the claim on the basis of said formula and thus the arbitrator was not entitled to invoke the same in the award.

6 Per contra the counsel for the respondent has contended that the petitioner having not disputed its liability for damages, cannot object on the ground of applicability of the Hudson's Formula by the arbitrator in the award; it is argued that the arbitrator had to apply some basis for assessing damages, once liability had been determined and is not disputed in this court also. It is further the contention that this court is not exercising the appellate jurisdiction and cannot interfere with the formula applied by the arbitrator. It is also urged that the respondent had in its written submissions before the arbitrator relied on the Hudson's Formula and in fact the petitioner had during the hearing before the arbitrator agreed to the same since the damages assessed thereunder were less than the damages claimed by the respondent. It is also argued that the arbitration being of a retired Judge of this court the petitioner ought not to be permitted to indulge in such dilatory tactics.

7 As far as the first submission of the petitioner regarding no claim certificate is concerned, the Supreme Court recently in ***National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.*** AIR 2009 Supreme Court 170 has reiterated that the said dispute is arbitrable and that if the party who has executed the discharge agreement or discharge voucher establishes that the same was executed on account of fraud, coercion, undue influence practiced by the other party, the same is not binding on that party and does not come in the way of that party making a claim.

8 In the present case the arbitrator has returned a finding of fact that the “no claim certificate” was executed by the respondent to be able to receive the payments which according to the petitioner were admittedly due to the respondent and which would not have been released by the petitioner to the respondent without signing such certificate. This finding of fact by the arbitrator is non-interferable under Section 34 of the Act and specially when as in this case it is based on cogent reasoning. The counsel for the respondent has in this regard relied upon ***R.S. Gupta Vs. Executive Engineer, DDA*** 2001 (Suppl.) Arb. LR 10 (Delhi), ***M/s. Hindustan Tea Co. Vs. M/s. K.Sashikant & Co.*** AIR 1987 Supreme Court 81, ***MCD Vs. M/s. Jagan Nath Ashok Kumar*** AIR 1987 Supreme Court 2316 and ***Puri Construction Pvt. Ltd. Vs. Union of India*** AIR 1989 Supreme Court 777.

9 As far as the other contention of the petitioner is concerned, there also I find the award to have correctly relied upon ***McDermott International Inc.*** (Supra). The arbitral award in that case upheld by the Supreme Court held that once it was established that the party was entitled to an amount on account of increased overhead

and loss of profit and additional project management cost, the construction law recognizes that construction contractor incurs two general jobs of costs in the course of its operation; i.e. the operating costs that are attributable to a particular project and costs such as overhead that are expended for the performance of the business as a whole including the particular project. It was further the award in that case that construction law recognizes that owner caused delay entitled the contractor to recover from the owner the increase in overhead and loss of profit as part of damages. Reference therein was also made to the various formulas in that regard including the Hudson's Formula. The Supreme Court relying upon ***M.N. Gangappa Vs. Atmakur Nagabhushanam Setty and Co.*** Manu / SC/0019/ 1972 held that the method used for computation of damages will depend upon the facts and circumstances of each case. The Supreme Court further held that the court could not interfere in the formula applied by the arbitrator and held the award to be not contrary to the Indian law for this reason.

10 In the present case also though the petitioner has contended that the arbitrator ought not to have applied the Hudson's Formula, nothing has been placed before the court to show that if instead of the said formula any other accepted formula, as noticed by the Supreme Court in ***McDermott International Inc.*** (Supra) had been applied, the liability of the petitioner would have been less. In the absence of any averment to the said effect, no ground is found to interfere in the award on this ground also. The plea that the Hudson's Formula was not pleaded also has no merit in the absence of an averment that it was the case of the petitioner before the arbitrator that some other formula should be applied.

11 No ground under Section 34 having been made out, the petition is dismissed. However since the petitioner has cooperated in early disposal of the petition, no order as to costs.

**RAJIV SAHAI ENDLAW  
(JUDGE)**

August 11<sup>th</sup>, 2009  
J