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

+ CS(OS) 193/2004

LLOYD INSULATIONS (INDIA) Plaintiff
Through: Ms. Neelam Rathore, Advocate
versus

AGM BMD DIVISION Defendant
Through: Mr. Manoj K. Das, Advocate.

% Date of Decision : MAY 12, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the 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.

J U D G M E N T

MANMOHAN, J (ORAL)

I.A. No. 2584/2005

1. Ms. Neelam Rathore, learned counsel for plaintiff-claimant states that she does not wish to press the present application. Accordingly, the same is dismissed as withdrawn.

I.A. No. 4718/2004

2. By way of the present application, objections under Sections 30 and 33 of Arbitration Act, 1940 (hereinafter referred to as “Act, 1940”) have been filed by the defendant-objector challenging the arbitral Award dated 31st August, 2003 passed by Mr. A.K. Pruthi, retired Deputy General Manager (Engineering), NBCC Limited.

3. The facts of present case have been stated in detail in the impugned Award. Briefly stated the relevant facts of this case are that in the year 1989, Rail India Technical & Economic Services (in short 'RITES') awarded to defendant-objector a complete civil work contract for construction of Exhibition Centre Building commencing from top of the pile caps and plinth beams. The defendant-objector in turn awarded various portions of the aforesaid work to a number of sub-contractors.
4. One such sub-contract was awarded by the defendant-objector to plaintiff-claimant vide Letter of Intent dated 27th August, 1992. The scope of work of this sub-contract was to design, fabricate, supply and erect at site pre-fabricated triangular shaped insulated steel panels complete with triangular frames MS perforated and GI plain sheets having 55 mm thick insulated material of 48 Kg per cum density suitable for erection over the roof framework already erected by the defendant-objector.
5. Since disputes arose between the parties, defendant-objector appointed Mr. A.K. Pruthi, as the sole Arbitrator. By virtue of the impugned Award, the sole Arbitrator awarded an amount of Rs.27,60,965/- to the plaintiff-claimant.
6. Mr. Manoj K. Das, learned counsel for defendant-objector submits that the impugned Award is contradictory and based on inconsistent findings. According to Mr. Das, the Arbitrator after concluding that the main cause of leakage of roof was plaintiff-claimant's bad workmanship and improper design, erroneously disallowed deduction of expenses

incurred on repairing the same as well as defendant-objector's counter claim for water proofing of the roof. The relevant portion of the impugned

Award relied upon by Mr. Das is as under:-

(a) The plea taken by the Claimant that gaps have arisen due to the temperature variations and for this reason the leakages have occurred and that he is not responsible for the same that water proofing was not in his scope of work, leads to believe that the Claimant while preparing his design for the work has not given any thought to this very important element of the design. The temperature variations during day and night and summer to winter and vice versa are quite common in Delhi and both the Claimant and his designers should know or ought to have known about this being primarily Delhi based firms and even otherwise such an important aspect of design should not have been ignored by the Claimant. The Claimant thus, cannot escape his responsibility that the design prepared by it was faulty so as not to cater for the expansions and contractions due to the temperature variations.

(b) The Claimant at no stage of proposals, discussions, and negotiations, prior to award of work, design stage and execution of work advised or even cautioned the Respondent that there will be leakages unless the water proofing is carried out on the roofing executed by him. Although it is felt strongly that water proofing on such like structures was absolutely necessary on long term basis of safety and the usage of the buildings this cannot give the liberty to the Claimant to execute his scope of work in a defective manner with loose gaps, improper riveting and overlaps etc so as to cause leakages immediately as the rains fell. It is felt that if the design was properly done for the choice of right type of materials to cater for expansions and contractions due to temperature variations and there was perfect workmanship both at the time of fabrication and installation, the leakages of water could have been avoided or would have been minimized during heavy rains and not to the extent as brought out by the Respondent and admitted by the Claimant. It is therefore felt that the main cause of the leakages is the bad workmanship and improper design, the responsibility of which primarily lies with the Claimant.

(c) The scope of work consists of "Design, fabrication

and Supply of prefabricated triangular shaped insulated steel panels compete with triangular frames, MS perforated and GI sheets having 50 mm thick insulation material of 48 kg per cum. Density and erection of above at site". The Claimant states that structural design of the roof cladding panels, shop drawings etc, were to be got prepared by approved consultants/architects and he was to be entirely responsible for the safety, soundness and performance of the design, fabrication, and erection. The specifications mentioned towards safety, soundness and performance are too vast and exhaustive and were required to be elaborate for precise responsibility of both the parties. These appear to be vague specifications as it gives unlimited responsibility on the Claimant by the fact remains that by agreeing to these specifications, the Claimant has assumed greater responsibilities towards safety, soundness and performance. Now, when the Respondent is taking cover under these specifications for unlimited responsibility for the Claimant, based on records produced and the oral arguments put forth by both the parties, it is felt that the correct interpretations of these specifications would be to limit the same to the use of specified and approved materials and best workmanship as per specifications and best engineering practices for such type of words. It is therefore, held that the Claimant has used specified, tested and approved materials but where it has failed is the design inadequacy to cater for expansions and contractions due to temperature variations and bad workmanship. The designs were checked by the Respondent's architects and clients and they did not find any fault with these. The fact that the leakages on rainfalls had commenced almost immediately on completion of work when very little expansions or contractions could have taken place to lead to gaps for the rain water to pour down, suggests that it was the bad workmanship which is the main cause of gaps for leakages and not primarily the expansions and contractions leading to these gaps resulting in the leakages of rain water. The thrust of the Claimant in its arguments that it is because of the temperature variations, gaps have been formed for the leakages to occur are not very convincing.

(d) The Claimant's arguments that no requirement was specified or even hinted by the Respondent either expressed or implied at any time before or after award of work and/or during execution of the work that cladding system erected by the Claimant without any water proofing treatment over it would have to be water proof

or leak proof during the monsoons is without any merit. If work was executed with proper care and attention and as per best engineering practices, the leakages were not likely to occur and it is here the Claimant has lacked in his proper performance. Even if it was specified between the Respondent and his clients to provide polymer treatment for the water proofing, the Claimant was not required to execute works in a defective manner assuming that the polymer treatment will take care of his defects. It is agreed with the Claimant that water proofing was not in his scope of work. The statement of the Claimant that it was a technical impossibility that a thin metallic sheath like cladding system made up of large number of small triangular panels connected with intermittently riveted joints could be made water proof or leak proof without any external water proofing treatment over it is unconvincing in as much as it was the duty of the Claimant to clarify these reservations before concluding his contract with the Respondent. The design was of the Claimant's own. If the Claimant knew these technical impossibilities, he ought to have made these deficiencies clear to the Respondent before signing the contract.

(e) It is held that the Respondent was right in asking the Claimant to hand over the domes etc. in a water proof manner as the specifications on safety, soundness and performance desired that the work was executed keeping in view these parameters for proper workmanship which would have prevented the leakages."

7. Mr. Das also submits that in view of the aforesaid finding of improper design and bad workmanship, the Arbitrator committed an error apparent on the face of the record by directing refund of security deposit and performance guarantees. In this connection, Mr. Das relies upon a judgment of the Supreme Court in ***K.P. Poulose Vs. State of Kerala & Anr.*** reported in ***(1975) 2 SCC 236***.

8. He further states that the Arbitrator, without reaching the conclusion that defendant-objector had breached the contract, has awarded

compensation to plaintiff-claimant of Rs.13,77,028/-. In this connection he places reliance upon a judgment of the Supreme Court in ***Union of India Vs. V. Pundarikakshudu and Sons*** reported in ***AIR 2003 SC 3209*** wherein it has been held as under:-

“(29) In this case the district judge as also the High Court of Madras clearly held that the award cannot be sustained having regard to the inherent inconsistency contained therein. The arbitrator, as has been correctly held by the district judge and the High Court, committed a legal misconduct in arriving at an inconsistent finding as regard breach of the contract on the part of one party or the other. Once the arbitrator had granted damages to the first respondent which could be granted only on a finding that the appellant had committed breach of the terms of contract and, thus, was responsible therefor, any finding contrary thereto and inconsistent therewith while awarding any sum in favour of the appellant would be wholly unsustainable being self contradictory.”

9. Mr. Das lastly submits that the rate of interest awarded by the Arbitrator is unreasonable and excessive. He points out that not only has the Arbitrator awarded excessive rate of interest @ 12% but has also awarded compound interest. In this connection, he relies upon the observations of the Supreme Court in ***Krishna Bhagya Jal Nigam Ltd. Vs. G. Harischandra Reddy & Anr.*** reported in ***(2007) 2 SCC 720***.

10. On the other hand, Ms. Neelam Rathore, learned counsel for plaintiff-claimant submits that in accordance with the sub-contract executed between the parties, plaintiff-claimant had not only got all designs and drawings prepared by the defendant-objector's consultants but had also got the same approved from the defendant-objector and their client RITES. Ms. Rathore states that not even once, defendant had pointed out that the roof cladding

system executed by the plaintiff-claimant, was expected to be water proof or leak proof by itself.

11. Ms. Rathore submits that leakage could have been prevented only by proper water proofing of the roof as required in the main contract executed between the defendant-objector and RITES. She contends that tightening of joints would not have made the roof water proof.

12. Ms. Rathore further states that since the Arbitrator allowed recoveries of Rs.9,74,494/- on account of defective work, the defendant-objector cannot seek additional reimbursement on account of alleged costs of repairs or for encashment of security deposits and/or performance guarantees.

13. Ms. Rathore further states that as the Arbitrator has rightly concluded that certain amounts were wrongly withheld and/or deducted by the defendant-objector, plaintiff-claimant is entitled to interest on the said withheld/deducted amounts in the form of compensation. According to her, the rate of interest awarded by the Arbitrator is also reasonable and fair.

14. Having heard the parties at length, I am of the view that scope of interference by this Court with an arbitral award rendered under Act, 1940 is limited. The Supreme Court in *Arosan Enterprises Ltd. Vs. Union of India & Another* reported in (1999) 9 SCC 449 has clearly outlined the scope of interference by this Court in objections filed by this Court in objections filed under Sections 30 and 33 of the Act, 1940. The relevant observations of the Supreme Court in the said judgment are reproduced

hereinbelow:-

“36. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

37. The common phraseology “error apparent on the face of the record” does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.”

(emphasis supplied)

15. Moreover, it is settled law that Arbitrator is the master of facts and law, and the Courts should not interfere with the award of the Arbitrator until and unless there is an error apparent on the face of the record. Also, when the parties select their own forum to decide the disputes, that forum must be conceded the power to appraise the evidence as well as quality and quantity of the same.

16. In the present case, the Arbitrator, on appraisal of evidence, has reached a conclusion that leakage of roof was due to plaintiff-claimant's bad workmanship and improper design. In my opinion, the said finding cannot be challenged in Sections 30 and 33 proceedings as the same is

neither perverse nor unconscionable. It is pertinent to mention that the plaintiff-claimant has not filed any application to challenge the said finding. However, I find that the sub-contract executed between the plaintiff-claimant and defendant-objector was not a back to back contract and did not incorporate the entire scope of work that defendant-objector had undertaken to execute for RITES. Water proofing of the roof was a specific item of the bill of quantities executed between the defendant-objector and RITES, but the same did not form a part of scope of the work between the plaintiff-claimant and defendant-objector. Though in rejoinder, Mr. Das tried to contend that there was a subsequent change in design and scope of work executed between the defendant-objector and RITES, I find that no such ground is urged in the present petition while challenging the impugned Award. Consequently, even if the design and workmanship of the plaintiff-claimant was faulty, plaintiff-claimant cannot be saddled with the costs of water proofing of the roof. In this connection, I may refer to the Arbitrator's finding with regard to the defendant-objector's counter claims which reads as under:

“b) Even otherwise, it is observed from the contract between the Respondent and RITES that the Respondent has not awarded the work to the Claimant in the same way as provided in the Bills of Quantities in the contract between the Respondent and RITES. It is observed from the bill of quantities that item no. 9 of the chapter “Roofing and Water Proofing” and a few other items exist for water proofing with 20 years guarantee. This item was to be executed by the Respondent which was not made part of the contract with the Claimant.

c) The Respondent plea that the leakage is due to the defective roofing work executed by the Claimant may be

partially true. But it is mainly because the Respondent has not executed the waterproofing work. The Respondent therefore, cannot hold the Claimant to do the water proofing work or bear the cost of the same without payment. The specification like safety, soundness and performance are too vague but are not definite to include water proofing. These specifications do imply that the structure erected will be sound, safe and perform and it has stood to that as confirmed by the fact that the Respondent has accepted the work and made payments except for a few deductions for defective work. The Respondent was aware that the water proofing has to be done. It is not understood why the water proofing was not done when the Claimant had finished its work. If water proofing was to me made part of the Claimant's scope of work with 20 years guarantee, it ought to have been well specified so that the Claimant could have taken note of the same and quoted and performed accordingly. This vital element has been kept in the dark."

17. I am also of the opinion that there is neither any inconsistent finding nor a contradiction in the impugned Award inasmuch the Arbitrator has awarded a sum of Rs.9,74,494/- on account of recovery for defective and repair works. I am of the view that after the aforesaid recovery has been upheld by the Arbitrator, the defendant-objector cannot seek either reimbursement of further sum of Rs.3,22,139.81/- as expenses incurred on repairs or forfeiture of security deposits and performance guarantees. I may also mention that no details of alleged expenses of Rs. 3,22,139.81/- have been filed either before this Court or before the arbitral tribunal.

18. The arbitral tribunal has given cogent reasons for rejecting defendant-objector's claim with regard to forfeiture of security deposits and reimbursement of expenses. The relevant portion of the impugned Award is reproduced hereinbelow:

“C) *SECURITY DEPOSIT*

It is observed from the final bill that the Respondent has deducted a total of Rs.4,30,773.00 towards security deposit from the Claimant's bills. Since the deduction of Rs.9,74,494.00 for bad workmanship has already been decided in favour of the Respondent, there is no further ground for retaining the security deposit or forfeiting the same by the Respondent. Therefore, the amount of Rs.4,30,773.00 is refundable to Claimant.

*D) **RISK AND COST** The Respondent has deducted in an ad-hoc manner in the final bill an amount of Rs.3,22,139.81 toward the cost of works executed at the risk and cost of the Claimant. The Respondent has not given the details of this expenditure and how the amount has been worked out. The Respondent has stated that he has incurred expenditure on repairs etc. As the deduction of Rs.9,74,494.00 has been allowed to the Respondent, there is no justification for allowing further deduction of Rs.3,22,139.81 in favour of the Respondent. The expenditure incurred for rectification therefore should be covered under the amount available with the Respondent from the part rates as decided in his favour as above. Therefore this recovery made from the final by the Respondent is disallowed.”*

19. However, I am in agreement with the learned counsel for defendant-objector that in the absence of conclusion that the defendant-objector had breached or violated the sub-contract executed between the plaintiff-claimant and the defendant-objector, the Arbitrator could not have awarded Claim No. 2 for Rs. 13,77,028/-. This in my opinion constitutes an error apparent on the face of the record. Consequently, the award under the said claim is set aside.

20. Moreover, as far as award of interest is concerned, I deem it appropriate to reduce the rate of interest. The Supreme Court in ***Rajendra Construction Co. Vs. Maharashtra Housing & Area Development***

Authority and Ors. reported in (2005) 6 SCC 678; *Mcdermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.* reported in (2007) 8 SCC 466 and *Rajasthan State Road Transport Corporation Vs. Indag Rubber Ltd.* reported in (2006) 7 SCC 700 has reduced the rate of interest. In fact, in *Krishna Bhagya Jala Nigam Ltd.* (supra), the Supreme Court has held as under:-

“11. here also we may add that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced at 9%.

21. Consequently, keeping in view the aforesaid judgments and the prevalent rate of interest, I reduce the rate of interest to 9% per annum simple interest for the period mentioned in the Award as well as till the date of payment.

22. With the modifications mentioned in paras 19 and 21, the impugned Award dated 31st August, 2003 is made rule of the Court and Registry is directed to prepare a decree in terms thereof.

23. Accordingly, present application and petition stand disposed of.

MAY 12, 2010
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MANMOHAN,J