

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

+ **Date of Decision : 21.07.2010**

% **O.M.P. 177/2002**

M/S N.K. GARG & CO. Petitioner
Through: Mr. Raman Kapoor & Mr. Honey
Taneja, Advocates

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Jitendra Kumar Singh,
Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may
be allowed to see the judgment? : No
2. To be referred to Reporter or not? : No
3. Whether the judgment should be reported
in the Digest? : nO

VIPIN SANGHI, J. (Oral)

1. The petitioner has preferred the present petition under Section 34 of the Arbitration & Conciliation, 1996 (the Act) to seek the non-award of some portion of the amount claimed under claim No.1 by the petitioner.

2. The petitioner contractor was awarded the contract involving, inter alia, earthwork in embankment i.e. filling/cutting earth in

embankment to the required profile and various other works between the chainage Km. 139.500 to Km. 134.200, Km. 133.00 to Km.131.100 and Km. 130.700 to Km. 129.400 in connection with the 02nd line work of doubling of the Ghaziabad-Hapur railway track.

3. In relation to the said contract disputes arose between the parties, which were, as per clause 64 of the General Conditions of Contract contained in the agreement entered into between the parties, referred to an arbitral tribunal consisting of three learned arbitrators, namely, Sh. R.K. Kardam, Advisor/Judicial Commission, Northern Railway, Baroda House, New Delhi, Mr. Shanker Banerjee, FA & CAO/W&S (on trg.) Northern Railway, Baroda House, New Delhi and Mr. Parmatma Sharan, Chief Engineer/Const/Survey, Northern Railway, Kashmere Gate, Delhi. This was done in pursuance to a petition filed by the petitioner under Section 11 of the Act to this Court for appointment of arbitrators. The learned arbitrators rendered the aforesaid award allowing various claims made by the petitioner.

4. I may note that the objections preferred by the respondent to the said award were dismissed by this Court and the said decision has attained finality right upto the Supreme Court.

5. The present petition, as aforesaid, has been filed on a limited aspect, on the ground that while making their award on claim No.1 (which was for earth works executed and remaining amount due on account of final bill, for Rs.15,50,000/-, and which was enhanced

subsequently to Rs.17,47,185/-), the learned arbitrators did not take into account the earth works done by the petitioner in chainage Km. 139.150 to Km. 129.400 amounting to earth work of 51,862 cubic meters, and the award only considered the earth work done in the chainage Km. 139.500 to Km. 139.150, which was 12,650 cubic meters. The relevant portion of the award on claim No.1 reads as follows:

"Claim No.	Description of claims	Amount Claimed	Amount Awarded
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CONTRACTOR'S CLAIM

- | | | | |
|----|---|----------------|---------------|
| 1. | Claim for works executed and remaining amount due on account of final bill. | Rs.15,50,000/- | Rs.8,75,000/- |
|----|---|----------------|---------------|

Reasons of amount awarded:

The claimant while submitting their statement of facts had claimed Rs.17,47,185/- for the works executed and remaining amount due on account of final bill. After hearing the arguments of both claimants and respondent and going through the documents produced before us, the claim is partly allowed as the claimant had executed some work for which neither payment has been made nor it is proposed to be made in the so called final bill prepared by the respondent. After going through the documents/papers it is seen that the claimant had executed E/work in Km. 139.15 to Km. 139.50. The claimant and the respondents has taken the joint measurements of the work done by the claimant in the presence of the Local Commissioner appointed by the Hon'ble Court. It is also seen that no payment was made for this work to the claimant or any other agency. Since the work has been executed partly by the claimant and Rly. would have paid to the other agency had work been undertaken by any other agency, the payment becomes due to the claimant. Respondents has prepared the final bill of Rs.3,01,257/- but the same was not paid to the claimant. A total of Rs.8,75,000/- (including of Rs.3,01,257/-) is considered reasonable and therefore, Rs.8,75,000/- is awarded against this claim."

6. The submission of Mr. Kapoor, learned counsel for the petitioner is that in earlier proceedings this Court had appointed a local commissioner, who had measured the earth work done by the petitioner in chainage Km. 139.500 to Km. 139.150 as 12,650 cubic meters and the work done in the chainage Km. 139.150 to Km. 129.400 as 51,862 cubic meters. He submits that while making their award the learned arbitrators omitted to consider the work done in chainage Km. 139.150 to Km 129.400 amounting to earth work of 51,862 cubic meters and the award made by the tribunal for Rs.8,75,000/- (which included Rs.3,01,257/- the amount admitted to be due to the petitioner under the final bill), pertained only to the work done in chainage 139.500 to Km. 139.150 amounting to 12,650 cubic meters. Mr. Kapoor, therefore, submits that the petitioner is entitled to be paid for the earth work of 51,862 cubic meters which had not been considered by the tribunal. Mr. Kapoor submits that in the final bill the respondent had accepted that the petitioner had done earth work between chainage Km. 139.150 to Km. 129.400. However, the same had been wrongly computed as only 32143.66 cubic meters, for which the respondent had allowed balance payment of Rs.87420.15 after taking into account the payment already made. He submits that after applying the necessary deductions under the contract terms and after accounting for the quantity of earth work included in the final bill, the petitioner is entitled to be paid for the balance work done, which comes to about 16,000 cubic meters. Mr. Kapoor submits that the

arbitral award does not give any reasons as to why the balance work done in chainage 139.150 to 129.400 has not been considered by the tribunal as due for payment. He submits that the tribunal was obliged to render a reasoned award since the amount claimed was more than Rs.3 Lacs under Clause 64 of the General Conditions of Contract.

7. Before preferring these objections the petitioner moved an application before the tribunal under Section 33 of the Act, raising the same issue, which was rejected by the tribunal on 28.03.2002 by observing that the award dated 11.02.2002 stands good as it is.

8. On the other hand, the submission of Mr. Singh, learned counsel for the respondent is that the arbitral tribunal consisted of three experts in the relevant field who had applied their mind to all matters before them while making the award, including on claim No.1. He submits that the stand of the respondent before the arbitral tribunal was that the petitioner was not entitled to any payment for earth work done in the chainage Km. 139.150 to Km. 139.500 since this particular work had been done by some other agency. Further, no joint measurement of the initial level (before the performance of the earth work) in the said chainage had been taken. He submits that, therefore, the respondent while preparing the final bill of the petitioner had consciously not included any amount of work claimed to have been done by the petitioner contractor in chainage Km. 139.150 to Km. 139.500.

9. By reference to the final bill he submits that the amount of Rs.3,01,257/- for which the final bill had been prepared included the balance payment due to the petitioner contractor for the earth work done of 32143.66 cubic meters in the chainage Km. 139.150 to Km. 129.400, quantified at Rs.87,420.15. This very work had been measured by the local commissioner as 51,862 cubic meters (without application of applicable deductions). He further submits that measurement made by the learned local commissioner of the earth work done by the petitioner was raw data, inasmuch, as the applicable deductions as provided for in the contractual terms and for various other reasons had not been made. However, the arbitral tribunal, which consisted of three technical persons had examined the measurements of the work as reflected in the final bill; in the report of the local commissioner, and; the deductions as made by the respondent, and had thereafter allowed the petitioner's claim for Rs.8,75,000/- (including Rs.3,01,257/-).

10. Having heard learned counsels and perused the record and considering the scope of these proceedings, I am of the view that there is no merit in the submission of the petitioner and the objection raised by the petitioner deserves to be dismissed. The tribunal, while dealing with claim No.1, consciously stated that the claim made by the petitioner was being "partly allowed" as the petitioner claimant had executed "*some work for which neither payment has been made nor it is proposed to be made in the so-called final bill prepared by the*

respondent." The earth work which the respondents had not made payment, and had not even proposed to make payment fell in chainage Km. 139.500 to Km. 139.150 and to the extent of 19718.34 cubic metres (51862-32143.66 cubic metres). I may hasten to add that the petitioner, after applying the deduction, claims payment for 16000 cubic metres.

11. Thereafter the tribunal held that earth work had been done in chainage Km. 139.150 to Km. 139.500. This finding is recorded because it was the submission of the respondent that no work had been done by the petitioner in that chainage. The Tribunal also referred to the joint measurements recorded by the local commissioner. It also noted that no payment was made for "this work" to the claimant or any other agency. On the basis of the records before it the tribunal concluded that the petitioner had executed the work partly and, therefore, payment was due to the petitioner claimant.

12. So far as the submission of the petitioner with regard to non-payment for the earth work to the extent of 16000 cubic metres in chainage 139.15 to 129.400 is concerned, the tribunal appears to have rejected it by observing that *"After hearing the arguments of both claimants and respondent and going through the documents produced before us, the claim is partly allowed as the claimant had executed some work for which neither payment has been made nor it is proposed to be made in the so called final bill prepared by the*

respondent”. Pertinently, the arbitral tribunal rejected the petitioner’s application under section 33 even though this aspect was precisely raised before it.

13. After taking into account the final bill prepared for Rs.3,01,257/- (which included earth work done in chainage Km.139.150 to Km.129.400) the tribunal awarded an amount of Rs.8,75,000/- (including Rs.3,01,257/-).

14. However, it is well-settled that the reasons, that the tribunal may give, need not be detailed and it is sufficient if they indicate the general drift of their thought process. From the award made on claim No.1, the following aspects emerge:

- (i) That the tribunal consciously allowed claim No.1 partly.
- (ii) That the tribunal concluded that the petitioner claimant had executed “some work”. It also observed that the work had been executed “partly” by the claimant.
- (iii) It observed that the respondent had neither made payment nor proposed to make payment in the so-called final bill prepared by it in respect of some work executed by the claimant. This included the work done in chainage 139.15 to 129.400 to the extent of 16000 cubic metres.
- (iv) The tribunal was conscious of the report of the local commissioner.

15. It is well-settled that it is not for the Court in these proceedings to go behind the award and to take upon itself the task of recalculating the figures. Such an exercise is prohibited by the law. I am satisfied that the award discloses sufficient reasons.

16. It, therefore, cannot be said that the tribunal simply overlooked to take into account the balance work of 16000 cubic metres in chainage Km. 139.150 to Km. 129.400, as claimed by the petitioner. If that had been the case, the tribunal would have certainly relooked into its award on claim No.1.

17. For the aforesaid reasons, I find no merit in this petition. Dismissed.

VIPIN SANGHI, J.

JULY 21, 2010
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