

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

+ **OMP No. 398/2002**

19th January, 2010

NATIONAL HYDRO ELECTRIC POWER CORP. ...Petitioner

Through: Mr. B.P. Singh, Advocate and Mr.
Anil Gaur, Advocate.

VERSUS

CIMCO BIRLA LTD. Respondent

Through: Mr. P.K. Bansal, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. By this petition under Section 34 of the Arbitration and Conciliation Act, 1996 the petitioner challenges the Award dated 9.8.2002 passed by the Sole Arbitrator. The only issue which has been decided by the impugned Award is with regard to the claim of the respondent herein (and who was the claimant in the arbitration proceedings) for reimbursement of the sales tax amounts which were illegally recovered by the petitioner herein from the bills of the claimant/respondent.

2. To appreciate the controversy, it is necessary to refer to certain Clauses of the Contract and which are Clauses 47, 50.5 and 50.6. These clauses read as under:

“Clause 47 The bid price shall include complete cost of all materials, equipments, labour, handling, transportation, transit insurance etc. required for the completion of works. The prices shall also be inclusive of any or all taxes, duties and levies etc. as provided in clause 50.3 and 50.5(a).

However, the prices shall be exclusive of the excise duty, levies, taxes etc. leviable on the various items manufactured/fabricated at contractor's works for further erection at Project, duties and levies shall be reimbursed by the Corporation to the Contractor as per actual on production of proof of payment to the satisfaction of Engineer-in-Charge.

The bidder shall however, indicate the amount of excise duty leviable, if any, item-wise considering the present rate of excise duty.”

“Clause 50.5 TAXES, DUTIES AND LEVIES ETC.

a) All existing sales tax or any other tax or duty or levy, such as Octroi, Dharat, Royalty, Excise Terminal Tax etc. on all consumables and materials, including, Petrol, Oil and Lubricants (and increase, if any, on these during the currency of the contract) that the contractor has to purchase for the performance of the contract, be payable by the contractor and the Corporation will not entertain any claim for compensation whatsoever, in this regard. The rates quoted by the contractor shall be deemed to be inclusive of all such taxes, duties, levies etc. and any increase thereon.

b) However, if a New Tax or Duty or Levy (other than that existing on the date of opening of the tender) is imposed under a statute or law during the currency of the contract and the contractor becomes liable to and actually pays the same for obtaining consumables and materials required for bona-fide use on the works contracted, then the contractor shall immediately inform the Engineer-in-Charge in this regard. The Corporation will reimburse the same to the contractor on production of satisfactory proof of payment, provided that the amount thus claimed is not paid under Price Variation Clause in the contract.”

“Clause 50.6 Central or State Sales Tax on completed work, if payable and paid by the Contractor, shall be reimbursed by the Corporation on the production of satisfactory proof of payment.”

(Emphasis added)

3. The Arbitrator has, essentially relying upon Clause 50.6, held that the liability of Sales Tax is to the account of the petitioner and not the respondent. For the reasons given hereinafter in my opinion, no fault can be found with the Award in this regard. In addition to the reasoning given by the Arbitrator, in my opinion, that once there is a specific clause which directly deals with reimbursement of sales tax, then other general clauses cannot denude the effect of such a specific clause providing for reimbursement of the sales tax. I may note that in the Award there is a reference to an Award of Justice Avadh Behari Rohatgi (Retd.), passed in respect to the disputes between the same parties, involving more or less the same issues, the only difference being that, in the arbitration proceedings before Justice Avadh Behari Rohatgi (Retd.) the issue pertained to Central Sales Tax, whereas the present case pertains to State Sales Tax. The counsel for the respondent on instructions from Mr. P.C. Gupta, Chief Manager (commercial) states that the petitioner has accepted the Award of Justice Avadh Behari Rohatgi (Retd.) and in fact has paid the amount under the said Award. In the said Award of Justice Avadh Behari Rohatgi(Retd.) also relying on the same clauses, it has been held that the respondent was entitled to reimbursement of the Central Sales Tax.

4. The counsel for the petitioner canvassed that in terms of Clause 50.6, there was no “completed work” and therefore no benefit can be taken of Clause 50.6. In my opinion, this argument is clearly misconceived because the contract in question is a works contract. In a works contract, the expression “completed work” would have different manifestations. It is not as if that sales tax should be paid on the total and final amount of the works contract before it can be claimed under Clause 50.6. Even to an ingredient of work, when it is performed or supplied under the subject works contract and with respect thereto sales tax is payable, then, it cannot be contended that expression “completed work” prevents the contractor from getting reimbursement of the sales tax on such individual items which are incorporated in the subject works contract. The Arbitrator has dealt with these issues in paras 20 and 21 of the Award and the same reads as under:

“20. And lastly, the fall back is on clause 50.6 which in clear terms state that Central or State Sales Tax on completed work if paid by the Contractor had to be reimbursed by the Corporation on production of satisfactory proof of payment. The operation of this Clause has been sought to be distinguished by the Respondent on the ground that it concerns “completed work”, while the contract in the present case in no unequivocal words qualified that to be essentially a works contract. To such works contract the operation of Clause 50.6, it has been pleaded does not arise. It has also been urged that the Sales Tax levied on the Claimant was illegal as no tax was payable except that upon the works contract in the present contract. No question of tax on completed works arose.

21. In my opinion the use of the words “completed work” has not to be confused so as to convert this works contract into a contract of completed work. If that was so there was no point in incorporating Clause 50.6 in this contract which was otherwise a works contract. The words “completed contract” in this clause have to be understood as to have reference to what works got completed. After all, all works contracts have at one stage or different stages to acquire completion so

far as different items are concerned. It was as such that at various stages, TDS on those works in progress was deducted by the Respondent, and an understanding existed between parties that on the assessment of sales tax by the Sales Tax Authorities and payment of the same by the Claimant it would get reimbursed. A careful perusal of the nature of the contract as brought out in paragraph 1 of this Award shows that the same involved several items and stages. There was no such thing as contract as a whole, Keeping in view the basic nature of the contract, there is no escape from interpreting and understanding the words “completed work” in clause 50.6 to have reference to works as they got completed or even at the final stage.”

5. In my opinion therefore and especially in light of the fact that the Award with respect of the Central Sales Tax Act, the Award of Justice Avadh Behari Rohatgi stands accepted by the petitioner, and additionally also because the Arbitrator being entitled to and has accordingly interpreted the clauses of the contract, and, which interpretation will not be interfered with by this Court as no perversity is shown, I feel that the objections are clearly misconceived and are liable to be dismissed. Merely because two views are possible, this Court cannot interfere with one interpretation and one plausible view taken by the Arbitrator.

6. Accordingly, the objection petition is dismissed with costs of Rs.25,000/-.

VALMIKI J.MEHTA, J

January 19, 2010

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