

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

+ **OMP 499/2009**

Date of decision : March 18, 2010

UNION OF INDIA

... Petitioner

Through: Mr. Jitender Kumar Singh, Advocate

VERSUS

M/S. HARBHAGWAN HARBHAJANLAL

....Respondent

Through: Mr. A.K. Singla, Sr. Advocate with  
Mr. J.K. Sharma, 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?
3. Whether the judgment should be reported in the Digest?

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**JUDGMENT (ORAL)**

**VALMIKI J. MEHTA, J**

**I.A. No. 11034/2009 in OMP 499/2009 (Condonation of Delay)**

For the reasons stated in the application, the delay of 15 days in re-filing the OMP is condoned.

The application is accordingly disposed of.

## **OMP 499/2009**

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the Award dated 9.4.2009 passed by the Sole Arbitrator deciding the disputes between the parties which arose with respect to a contract awarded to the respondent-contractor for construction of a Road Over Bridge on Panthal-Teerthi Road in Udhampur-Katra section in the State of Jammu & Kashmir. The counsel for the petitioner pressed two issues under Claim No. 1 and the third issue with regard to interest.

2. So far as the first issue under Claim No. 1 is concerned, the issue was whether recovery of the unaccounted steel should be at double the contractual rate or only at the contractual rate. The facts of the case are that certain amount of steel which was issued by the petitioner to the respondent was not consumed in the work and hence not accounted for. The respondent was, therefore, liable to pay for the value of this unaccounted quantity of steel to the petitioner. The Arbitrator has held that a clause in the nature of recovery of double the contractual amount is in the nature of penalty and violative of Section 74 of the Contract Act, 1872. It was held that double the rate could not have been claimed unless loss is shown to have been caused on account of the value of steel having doubled. I do not find any illegality or perversity with this finding, which is in fact perfectly in accordance with law, because if there is deficiency in the steel quantity which has not been returned to the petitioner, the petitioner is entitled

to the value of such quantity of the steel but such quantity is to be taken at the normal value of the deficient quantity of steel and not at double the rate because such latter action would amount to penalty and, therefore, violative of Section 74 of the Contract Act. Objection qua this issue of Claim No. 1 is rejected.

3. The second issue of Claim No. 1 pertains to the reimbursement of Sales Tax. The Arbitrator has held that the respondent was entitled to such reimbursement because as per the decision of the petitioner itself, for contracts post 01.04.1999, the extra burden of 2.1% sales tax was to be reimbursed. Admittedly, the contract in question was awarded on 11.11.1999 i.e. after 01.04.1999. The relevant portion of the Award, which deals with the issue as raised before the Arbitrator, reads as under:

“ The Respondent alleges that reimbursement of Sale Tax in present case is not admissible to be contractor in terms of policy decision of Headquarter Office circulated vide letter no.74-W/O/4/WA dated 21.03.2003 (Annexure 5). It is pleaded that as the work was awarded on 11.11.1999 i.e after 01.04.1999 (date of notification of enhancement of turnover tax in J& K State to 4.2%), hence reimbursement is not applicable in this case and amount already reimbursed i.e. Rs.1,48,803/- has been proposed to be recovered from final dues payable to the contractor.

Annexure 5 is copy of letter dated 21.03.2003 written by Chief Engineer to all Dy. CE/Cs, Northern Railway, Jammu-Udhampur Railing Project & Udhampur-Srinagar-Baramulla Project on the subject of reimbursement of turnover tax on works contracts on these projects. They have been informed that HQ office was seized of this matter and after examining the same has decided that for all contracts finalized between 23.07.1997 and 31.03.1999, tax will be deducted @ 2.1% including surcharge and the same shall not be reimbursable. However, if these works were in progress beyond 31.03.1999 and/or still in progress, for the period from 01.04.1999 when State Govt. Notified tax @ 4.2% the extra burden of 2.1% shall be reimbursable. For contracts finalized on 01.04.1999 and thereafter with such clauses existing in contracts, no turnover tax which has

already been deducted from the contractor @ 4.2% shall be reimbursable and the same shall be fully borne by the contractors as per law of land which will prevail. It is further stated therein that the decision will be taken on case to case basis with HQ Finance concurrence based on the above guidelines, the field units shall submit the proposals alongwith documents to Headquarters. It is further mentioned that instruction issued by D.O. dated 16.01.2002 stands withdrawn.

From the above it is apparent that there were different instructions in DO dated 16.01.2002 which have been withdrawn on 21.03.2003. In the case under consideration the agreement between the parties is dated 11.11.1999, which has been completed on 02.04.2002. This matter is to be determined with reference to the terms agreed between the parties and instructions applicable at that time. The instructions circulated vide Annexure 5 nearly an year after completion of this project will not retrospectively govern the contract entered into and executed prior to issuance of these instructions by the Headquarters of the Respondents unilaterally. Moreover, as per this letter, each case is to be dealt with separately and is to be sent to Headquarters for decision. The Respondent has nowhere alleged that the matter in issue on this point in this case was referred to Headquarters or that any decision of the Competent Authority has been obtained thereon. Moreover, Special Condition of this contract provided:

*“The tender documents referred to in clause 2.1.1 above will govern the works the works done under this contract in addition to documents referred to in clause 6.1.1 above.....”*

Vide clause 33.0 quoted above, the Respondents themselves had undertaken to reimburse Sales Tax on turn over if charged from the contractor, specifically stating that at present no Sales Tax on turn over is being charged from contractors in Jammu & Kashmir State. Had this representation been not there in tender documents, the tenderers were expected to ascertain and consider the same while quoting rates. There is force in submission of learned Counsel for claimant that the Respondent does not stand to loose by honouring its commitment of reimbursement, as otherwise the tenderer would have considered this liability and would have included it in the rates quoted for the purpose, and the Respondent by making payment accordingly would have indirectly reimbursed liability of the Contractor in this regard. Now, after having undertaken to reimburse this tax in so many specific words, the Respondent by applying policy decision communicated vide letter dated 21.03.2003 is causing injury/loss to the contractor i.e. by effecting recovery which is in fact is breach of term of the contract, which law does not permit.

Submission of the Respondent that representation in tender documents is against law can at the most amount to saying that there was mistake of law but that does not even make the contract voidable as per Section 21 of the Indian Contract Act. This contract entered into is not unlawful as envisaged in Section 23 of the Indian Contract Act. It does not contravene or defeat any provision of law and does not evade law of liability to pay Sales Tax, nor it tends to deprive the Sales Authorities of the revenue. This merely stipulates the terms agreed between the parties as to who will bear burden of payment of that tax and the parties were free to agree.

Submissions of the Respondent are that as per clause 37 of GCC, the rate shall be deemed to cover all taxes and the claimant cannot take plea of ignorance of imposition payable to local authorities as governed by the law of the land at the time of submission of the offer as the same cannot evade the attention of tenderers. This does not come to its rescue as, as per its own showing, even the Respondent was ignorant about it.

It is further pleaded by the Respondent that the tenderer while submitting his offer did not bring any discrepancy/omission relating to existence of turn over tax on works contract to the notice of the Railway. This is rather a strange plea. The Railway authorities stationed at J&K are saying that tenderer from out of State ought to have informed them about imposition of tax within their State. Moreover, nothing has been shown that it was duty cast on the tenderer to inform tender inviting Authority about law in force in its State on the subject.

In this connection, the Respondent has referred to clause 4 of part 1 of GCC which reads as follows:-

*“It shall be understood that every endeavour has been made to avoid any error which can materially affect the basis of the tender and the successful tenderer shall take upon himself and provide for the risk of any error which may subsequently be discovered and shall make no subsequent claim on account thereon.”*

This is not relevant as it refers to error effecting basis of the tender, while liability to pay tax, which is not to be avoided by anyone, cannot be termed as materially effecting basis of tender, and Law does not prohibit authorities from undertaking to reimburse tax payable by the contractor. Moreover, it is not the tenderer who is coming up with any claim on the account of this agreed clause containing the alleged error, and rather it is authorities who have come up with the plea of recovery on the basis of the alleged error, thereby trying to take advantage of its own wrong if any by avoiding the agreed clause by taking shelter under plea of error, for which the tenderer is in no way responsible. It is not a case of omission. Rather

the Railways authorities on their own made specific positive representation to the tenderers that at present no Sales Tax on contract turnover is being charged from the contractors in Jammu & Kashmir State, on which the tenderer/claimant coming from another State relied and acted upon, no reason having been shown as to why the tenderer was to doubt veracity thereof or was still under any contractual or legal obligation to verify the position. Hence, the Respondents are not entitled to make any recovery on account of reimbursement of Sales Tax from the final bill.”

There is no illegality or perversity in the aforesaid findings and nor are the findings against the provisions of the contract. Therefore, it is impermissible to interfere with such findings under Section 34.

4. The third issue which was urged by the petitioner was with regard to Claim No. 10. Claim No. 10 was the claim of the contractor/respondent before the Arbitrator for interest on all its claims. The defence of the petitioner in the arbitration proceedings was that no interest was payable by virtue of Clause 16(2) of the General Conditions of Contract (GCC). The Arbitrator has however awarded the claim of interest. I have recently had an occasion to consider an identical clause in the judgment dated 5<sup>th</sup> March, 2010 in O.M.P. No.44/2010 titled as *Union of India vs. M/s. Chenab Construction Joint Venture* wherein I have interpreted such a clause and held that at best such a clause entitles the petitioner not to pay interest on the earnest money and the security deposit amounts, however, such a clause cannot mean interest ought not to be awarded on other claims. The relevant paras of this judgment are as under:-

“12. The last issue which was urged before this court was that the Arbitrators have erred in awarding interest against the contractual

provisions. The counsel for the petitioner has for this purpose relied upon a recent Supreme Court judgment reported as *Sayeed Ahmed & Co. Vs. State of U.P. & Ors. 2009 (3) Arb. LR. 29*. The relevant clause of the contract before the Supreme Court in *Sayeed Ahmed's* case reads as under:

“No claim for interest or damages will be entertained by the government with respect to any money or balance which may be lying with the government or may become due owing to any dispute, difference or misunderstanding between the Engineer-in-charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-charge in making periodical or final payment or any other respect whatsoever.”

In the light of the aforesaid clause, which is a comprehensive clause for all the claims under the contract, the Supreme Court held that the contractor is not entitled to interest in the light of the contractual provisions.

The contractual Clause so far as the present case is concerned and which has been relied upon by the counsel for the petitioner reads as under:

“16(2)Interest on amounts- No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.”

On the basis of the aforesaid Clause 16(2) and the decision in *Sayeed Ahmed's* case, the counsel for the petitioner has contended that interest should not have been awarded.

13. In my opinion, this contention of the counsel for the petitioner is not a valid contention. This is for the reason that the expression “amounts payable to the contractor under the contract” as occurring in Clause 16(2) is an expression which is necessarily to be read *ejusdem generis* with the expression of “earnest money” and “security deposit” as found in this very clause. That this expression should be read as *ejusdem generis* is clarified by Clause 16(1) which is immediately above the Clause 16(2), and which reads as under:

“16(1) Earnest money and security deposit:- The earnest money deposited by the Contractor with his tender will be retained by the Railway as part of security for the due and faithful fulfilment of the contract by the Contractor. The balance to make up this security deposit which will be 10 per cent of the total value of the contract, unless otherwise specified in

the special conditions, if any, may be deposited by the contractor in cash or in the form of Government Securities or may be recovered by percentage deduction from the Contractor's "on account" bills, provided also that in case of a defaulting contractor the Railway may retain any amount due for payment to the contractor on the spending 'on account bills' so that the amount or amounts so retained may not exceed 10% of the total value of the contract."

A reading of Clause 16(1) shows that non payment of interest is with respect to the amounts which are withheld either as earnest money or security deposit. The subject Clause 16(1) is not for all amounts under the contract. In the facts of this case, interest which has been awarded by the Arbitrators has nothing to do with the amounts which have been withheld towards the earnest money and security deposit. I therefore reject the contention that no interest was payable on the amounts as awarded by the Arbitrators as the interest awarded does not pertain to earnest money or security deposit amounts.

14. The counsel for the petitioner in addition to the judgment of *Sayed Ahmed's* case has relied upon the decision of the Supreme Court in the case of *M.B.Patel and Company Vs. Oil and Natural Gas Commission 2008 (8) SCC 251*. On a first reading, the clause in *M.B. Patel's* case appears to be similar to the Clause 16(2) in question, however, the Clause in the case of *M.B. Patel* is not similar because in the facts of the present case there are two Clauses 16(1) and 16(2) and not only one clause similar to Clause 16(2) as found in the facts of the *M.B.Patel's* case. In the case of *M.B.Patel*, the relevant clause was an independent Clause 18 which reads as under:

"18. *Interest on amounts:-* No interest will be payable on the security deposit or any other amount payable to the contractor under the contract."

In my opinion, the judgment in *M.B.Patel's* case also will not apply to the facts of the present case. If there is a standalone clause like Clause 18 and which would be equivalent to Clause 16 (2) in the facts of the present case, then, the expression "any other amount payable to the contractor" can be read as meaning all types of amounts payable but, as I have already stated above, in the facts of the present case, the relevant clause is only a sub-Clause 2 of the main Clause 16(1) and therefore, the expression "any other amount payable to the contractor" has necessarily to be read in the context of Clause 16(1) and also to be therefore read *ejusdem generis*."

Accordingly, this objection is partly allowed and partly rejected because

the final Award is for a sum of Rs. 4,00,290/- of which Rs. 2 lakh is for refund

of security deposit. Accordingly, with respect to issue No. 3 which is bearing on the last para of the Award, where the Award has been passed for a sum of Rs. 4,00,290/- with interest @ 9% per annum, the said portion would stand amended and would be read as interest @ 9% per annum payable from 1.12.2003 till payment/realization on the amount of Rs. 2,00,290/- and not on an amount of Rs. 4,00,290/-.

5. In view of the above, there is no merit in the petition except to the extent of modifying the entitlement of interest only on Rs. 2,00,290/- and not on Rs. 4,00,290/-. The rest of the objections are dismissed. The petition is disposed of leaving the parties to bear their own costs.

**I.A. No. 11033/2009 in OMP 499/2009**

6. Since the petition has been disposed of, no orders are required to be passed in the application and the same is disposed of accordingly.

**VALMIKI J.MEHTA, J**

**March 18, 2010**  
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