

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.459/2008

Siri Ram Syal & Sons (P) Ltd. Appellant through
Mr.M.G. Ramachandran &
Mr. Pulkit Aggarwal, Advs.

versus

Ircon International Ltd. & Anr. Respondent through
Mr. K.R. Gupta, Ms. Kiran
Dharam & Ms. Shilpa
Bansal, Advs.

% Date of Hearing: January 13, 2010

Date of Decision: January 28, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether reporters of local papers may be allowed to see the Judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

1. This Appeal impugns the Judgment dated 20.8.2008 of the learned Single Judge, whereby the Arbitral Award in respect of two of the claims of the Appellant was set aside and the remaining Award was made the Rule of Court.

2. The brief facts of the dispute are that Respondent No.1, IRCON International Limited, bagged two contracts for improvement of roads from Road & Highway Department, Dhaka ('RHD' for short). This work was sub-contracted by

IRCON to the Appellant/Siri Ram Syal & Sons (P) Ltd.[SRS] for part of the total work. After the work was completed, differences with respect to Claims made under the contract arose between IRCON and SRS which necessitated resolution through Arbitration. A Sole Arbitrator was appointed before whom all the Claims and Counter-Claims were laid and the learned Arbitrator, after hearing the parties, passed a common Award in favour of the Appellant on 27.11.1997 under Arbitration Act, 1940 ('The Act' for short). Respondent had filed his Objections under Sections 30 and 33 of the Act essentially on the ground that the Arbitrator had ignored the method of assessing claims agreed by the parties and had evolved his own formula to calculate the Award for escalation in costs items of contract. As per the Respondent, this method of assessment of escalation cost was contrary to the mandate of Agreement between the parties and this warrants intervention of the court under Sections 30 and 33 of the Act.

3. Vide Order dated 20.8.2008, the learned Single Judge has set aside the compensation awarded on two Claims of the Appellant – firstly, the compensation for Claim No.3– viz. 'Payment of Balance Escalation' and secondly, the compensation awarded for Claim No.2 titled – 'Work done but not paid' under the Item 'Construction of traffic diversions'.

4. It is the contention of the Appellant that the learned Single Judge erred in setting aside its Claims awarded by the Learned Arbitrator in his Award dated 27.11.97 on the ground that the Learned Arbitrator transgressed his limits by writing a new contract between the parties. It has been urged by the learned counsel for the Appellant that the Learned Arbitrator has not gone against the agreement between the parties and in fact to do justice and balance the equities a formula to calculate the escalation was devised by the Arbitrator and the same is not a transgression of terms of agreement between the parties.

5. As is admitted by both the parties, IRCON had an escalation clause in its agreement with RHD and as per the agreement between SRS and IRCON, IRCON was expected to pay SRS the escalation amount obtained from RHD on back-to-back basis, after deducting IRCON's overheads and profits. Therefore, the agreement between the adversaries before us did not have a formula stipulated in the agreement between them for the calculation of the escalation cost but had agreed that the same would be *mutatis mutandis* governed by the formula by which RHD has paid escalation to IRCON.

6. The essential components in the formula devised in the agreement between RHD & IRCON are :-

1. A rise or fall in the indexed cost of labour, contractual plans, material and other inputs till a fluctuation of 10% shall not be considered. Thereby meaning that an escalation of price will be considered only when the same goes above 10% of the estimated cost.

2. The price adjustment factor is to be determined by a formula of general type by keeping a fixed coefficient 'x' representing a non adjustable position in contractual payment. There are other coefficients a,b,c etc. representing estimated proportion of each cost element.

3. Formula of general type is as under:-

$$P = x + a. EL/EL^{\circ} + b. LL/LL^{\circ} + c. PL/PL^{\circ} + d. FU/FU^{\circ} + e. BI/BI^{\circ} + f. CE/CE^{\circ} + g. RS/RS^{\circ} + h. ST/ST^{\circ} + i. BR/BR^{\circ} + j. MI/MI^{\circ}$$

In this EL, LL, PL etc. are current cost indexes and these are to be divided by EL° , LL° , PL° etc, which are bare cost indexes or price corresponding to various elements at a time prior to submission of bids.

7. It is admitted that IRCON received a sum of BDT 519,427,622.54 as escalation, out of which SRS has been paid BDT 4,10,47,989. In the reasoned Award, the learned Arbitrator, while dealing with the claims of the two sides, has recorded that the procedure suggested for calculation of the compensation for the escalation payable to SRS by both sides was not acceptable. Thus, preserving the basic essentials of the agreement between SRS and IRCON, viz. firstly, escalation payment to SRS

should be on back-to-back basis and secondly, escalation should be on the basis only on inputs of SRS and IRCON are not to be considered; the learned Arbitrator proceeded on his own method of calculation of the compensation for escalation.

8. The salient features of the method/formula adopted by the learned Arbitrator are-

1. The burden of fixed coefficient of 10% to be shared by both parties in proportionate basis.
2. Escalation has been worked out on the basic amount actually paid to SRS by IRCON. This automatically excluded the overheads and profits of IRCON.
3. Payment to SRS to be made in BDT as well as USD in the proportion in which IRCON has received from RDH keeping in view that the payments are to be made back to back to the SRS.
4. No escalation has been permitted where the same is less than 10 percent.

9. The defects pointed out by Arbitrator in procedure suggested by IRCON, which according to them was in closest proximity to the formula in the main contract, are that-

1. Burden of the fixed coefficient [(0.1) in all categories of work] has been thrown entirely on SRS.
2. Input weightage of items applicable only to IRCON has also been included as an additional fixed coefficient applicable to SRS.

3. The said manner of calculation is not logical and it deprives the escalation amount.

4. Escalation induces in respect of some categories of work need to be worked out correctly.

10. There is no gainsaying that the Arbitration Tribunal appointed by the parties is bound by the Agreement between the parties and an Arbitrator is not permitted to travel beyond the hedges placed by the clauses of the Agreement. Any transgression of these boundaries would certainly land an Arbitral Award in the nebulous territory of unsustainability. Hon'ble Supreme Court in the case of *Rajasthan State Mines & Minerals Ltd. -vs- Eastern Engg. Ent.*, (1999) 9 SCC 283 has laid perspicuous norms to be followed by Court while dealing with the objections against an Arbitral Award being beyond the scope of agreement referring dispute to Arbitration:-

23. It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose agreement is required to be considered. For deciding whether the arbitrator has exceeded his jurisdiction reference to the terms of the contract is a must. It is true that arbitration clause 74 is very widely worded, therefore, the dispute was required to be referred to the arbitrator. Hence, the

award passed by the arbitrator cannot be said to be without jurisdiction but, at the same time, it is apparent that he has exceeded his jurisdiction by ignoring the specific stipulations in the agreement which prohibit entertaining of the claims made by the contractor. In the letter dated 5-2-1985 appointing the sole arbitrator, it has been specifically mentioned that agreement dated 14-5-1981 was executed by and between the parties and that the contractor has raised the claims as mentioned in the letter dated 7-9-1983 which was denied by the Company and at the request of the contractor, the sole arbitrator was appointed to adjudicate the claims made by the contractor vide his letter dated 7-9-1983. This reference to the arbitrator also clearly provides that reference was with regard to the dispute arising between the parties on the basis of the agreement dated 14-5-1981. It nowhere indicates that the arbitrator was empowered to adjudicate any other claims beyond the agreement between the parties. No such issue was referred for adjudication. Even the arbitrator in his interim award has specifically stated that he was appointed to adjudicate the disputes between the parties arising out of the agreement dated 14-5-1981.

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44. From the resume of the aforesaid decisions, it can be stated that:

- (a) It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(b) It is not open to the court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the court cannot interfere.

(d) If no specific question of law is referred, the decision of the arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

e) In a case of a non-speaking award, the jurisdiction of the court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not

permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in *Continental Construction Co. Ltd.* (1988) 3 SCC 82 : (1988) 3 SCR 103, by relying upon the following passage from *Alopi Parshad v. Union of India* AIR 1960 SC 588: (1960) 2 SCR 793 which is to the following effect:

“There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory

contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an un contemplated turn of events, the performance of the contract may become onerous."

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law.

11. Therefore, as a prerequisite to set aside the claim for escalation granted in the Arbitration, the learned Single Judge had to be satisfied that :-

(a) There was a concluded agreement between the parties on the method of calculation of compensation for escalation and,

(b) That the Arbitrator while granting the said compensation has made a departure or manifestly disregarded the method that was agreed upon by the parties.

12. The learned Single Judge, while setting aside the Award, has returned the findings that the parties had agreed upon a specific formula for payment of escalation and that application of any other formula by the Arbitration would defeat the contract itself. It has been further held that the Arbitrator has not disclosed his mind regarding the calculation of escalation, and by applying a formula independent of those suggested by the parties, had transgressed his limits. With respect, in our considered opinion, the findings returned by the learned Single Judge are erroneous. The Clause regarding escalation payment is admittedly contained in paragraph 9 of the letter of the Appellant dated 21.12.1988 and the same reads as under:-

“Claims for extra items and escalation payment etc., shall be passed on to us on back to back basis after taking IRCON’s Overhead & Profit.”

13. This Clause does not provide for any formula or method for calculation of the escalation to be granted to SRS nor does it stipulate that the escalation has to be calculated only in accordance with the formula agreed upon between IRCON and RHD. As already observed earlier, the two stipulations which

conspicuously find mention in the said Clause is that firstly, the payment by IRCON has to be made on back to back basis and secondly, that the IRCON's expenditure and profits have to be excluded while granting the same.

14. From the reasoning given by the learned Arbitrator in his speaking Award, it is manifestly evident that these two stipulations have been clearly adhered to. The shortcomings of the formula suggested by both the parties have also been clearly set-out and the same are plausible. The methodology adopted by the Arbitrator and the reasons for the same are also clearly spelt-out in the Award. The division of burden of fixed coefficient is sound and reasonable; escalation has been calculated on the amount that was actually paid to SRS by IRCON as the working coefficient for each element and finding its ratio in terms of the contribution by SRS was reasonably considered to be cumbersome and could have led to an erroneous result. The payment being made in BDT and USD has been awarded, keeping the 'back-to-back' rule in mind.

15. Thus, in our view, there is no capricious divergence from the Agreement which could have led to a manifest illegality in Award which would be unsustainable by Courts.

16. As regards the Second Claim that was rejected by the learned Single Judge, we concur with the findings of the learned

Single Judge that the same was on "Excepted matter" and more so because the Agreement stipulated that SDS could only raise claims for which IRCON has received payments from RHD on back-to-back basis. As no claims had been raised on payments received by IRCON for making diversions of road, the Arbitration Tribunal erred in granting the same to the Appellant.

17. The Appeal is partly allowed. The impugned Order in respect of claim for escalation cost is set aside and the same is made rule of the Court along with rest of the Award accordingly. Parties to bear their own costs.

(VIKRAMAJIT SEN)
JUDGE

January 28, 2010

(MANMOHAN SINGH)
JUDGE