

F-250

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

+ O.M.P. 652/2007 & I.A. Nos. 15480/2008 & 9727/2009

UNION OF INDIA Petitioner
Through: Mr. V.K. Tandon, Advocate.

versus

M/S. R.S. SHARMA CONTRACTOR
PVT. LTD. Respondent
Through: Mr. Sandeep Sharma, Advocate
with Mr. Vikas Sharma and
Ms. Kanika Singh, Advocates.

% Date of Decision : March 5, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

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| 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)

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging the arbitral Award dated 16th August, 2007 as well as the corrigendum dated 26th August, 2007 passed by the sole Arbitrator Mr. V.S. Dixit, Chief Engineer (Retd.) CPWD.

2. Briefly stated the facts of this case are that on 21st December, 1996, respondent-claimant was awarded a construction contract for Pedestrian Subway across Outer Ring Road, near Saraswati Vihar, Delhi. While 31st December, 1996, was the stipulated date of commencement of work, 30th October, 1997 was the stipulated date of completion of work. However, the contract was completed by 02nd February, 1998, within the extension granted by petitioner-objector without levy of any liquidated damages. Petitioner-Objector by way of the present petition has challenged the Award insofar as it directs petitioner-objector to pay Claims No. 1, 2 and 6 to 8.

3. Mr. V.K. Tandon, learned counsel for petitioner-objector submitted that the learned Arbitrator could not have awarded any amount against Claim No.1 as respondent-claimant had agreed vide letter dated 04th March, 2002 to accept the rates arrived at by the petitioner-objector's competent authority. Mr. Tandon further submitted that the Award of the said Claim was contrary to a judgment of Supreme Court in *Nathani Steels Ltd. vs. Associated Constructions* reported in *1995 Suppl. (3) SC 324*. It is pertinent to mention that Claim No.1 was on account of alleged lesser rates paid than quoted/agreed rates for certain items. The relevant portion of the letter dated 04th March, 2002 written by the respondent-claimant reads as under:

“ xxx xxx xxx xxx

We are ready to reduce the rates of pending AHR items yet to be sanctioned by the department to the extent of market rates as derived by the competent authority at the time of actual execution of the deviated quantities of work.

We are also ready to accept the rates pending extra items as per the market rates as arrived at by the competent authority prevailing at the time of execution of the items.....”

4. Mr. Tandon also submitted that the learned Arbitrator had wrongly derived the rates while awarding Claim no.2. In this connection, he relied upon Clause 12 of the contract executed between the parties.

5. Mr. Tandon further submitted that Claim No.6 for extra item was liable to be set aside as it was based on wrong mode and method adopted while sanctioning extra items. Mr. Tandon contended that the respondent-contractor was not entitled to any amount under this head of claim as the respondent-contractor had been reimbursed actual cost worked out by the department.

6. Mr. Tandon lastly submitted that Award of interest as well as Claim No. 7 under Clause 10 CC was erroneous and could not have been granted. Mr. Tandon stated that petitioner-objector was not entitled to benefit of Clause 10 CC as the contract was to be completed in less than six months. He contended that Claim No. 7 was a duplication of Claims No. 2 and 6. According to him, assuming

without admitting that petitioner-objector was in breach, then also the Arbitrator at the highest could have awarded interest @ 6% per annum.

7. On the other hand, Mr. Sandeep Sharma, learned counsel for respondent-claimant submitted that Arbitrator was justified in awarding Claim No.1 as the Arbitrator had come to a factual finding that the undertaking dated 04th March, 2002 “*was taken under pressure and was not taken out of free will*”.

8. Mr. Sharma emphasised that Claim No.2 was entirely technical and factual in nature and outside the purview of Section 34 of the Act, 1996. Mr. Sharma pointed out that Arbitrator after examining all documents had concluded that the rate of extra Items No. 72 and 73 should have been derived from Item No. 2.1, as it was similar to Items No. 72 and 73.

9. As far as petitioner-objector’s objections with regard to Claims No. 6 and 7 were concerned, Mr. Sharma submitted that learned Arbitrator had after perusal of records arrived at a factual finding which could not be interfered with in Section 34 proceedings.

10. Having heard the parties at length and having perused the impugned Award, I am of the view that it would be appropriate to first outline the circumstances in which a Court can interfere with an arbitral

award passed under the Act, 1996. The Supreme Court in *Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi* reported in (2008) 13 SCC 80 after referring to a catena of judgments including *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* reported in (2003) 5 SCC 705 has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is:-

- (i) contrary to substantive provisions of law; or
- (ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) against the terms of the respective contract; or
- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties.

11. The Supreme Court has further held in the aforesaid judgment that an award can be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality.

12. In my view, keeping in view the aforesaid parameters, the impugned Award requires no interference except with regard to Claim No.1 inasmuch as the finding of the learned Arbitrator that the letter dated 04th March, 2002 was obtained without the respondent-claimant's free will, is based on no evidence. The letter dated 04th March, 2002, was not only given in writing but the same was not retracted at the earliest opportunity. Since the said letter was disputed for the first time during the course of the arbitral proceedings, the denial, in my opinion, is an afterthought. In fact, in my view, Claim No.1 is barred by

principle of “accord and satisfaction.” The Supreme Court in *Nathani Steels Ltd.* (Supra) has held that once there is a full and final settlement in respect of a dispute or difference in relation to a matter covered under the arbitration clause, such a dispute or difference does not remain an arbitrable dispute and the arbitration clause cannot be invoked in respect thereof even though for certain other matters, the arbitration agreement may remain in subsistence. Consequently, in my opinion, in view of the execution of the letter dated 04th March, 2002, the Arbitrator could not have awarded Claim No.1.

13. As far as the Award of Claims No. 2 and 6 to 8 are concerned, I am of the opinion that the learned Arbitrator has arrived at a factual finding after perusal of contemporaneous documents. For instance, with regard to Claim No.6, I may refer to the observations of the learned Arbitrator in the impugned Award which read as under:

“In my opinion, the Claimant had anticipated that the work may have to be carried below the underground water level for which pumping may be required. He, therefore, stipulated condition no. 6 in his letter dated 6.12.96 that “Any work done below ground water shall be considered for extra payment as per CPWD specification.” This condition was accepted by the Respondent and letter dated 6.12.96 of the Claimant is forming the part of the agreement. The structure was to be constructed below the underground water table. Hence, for safety of the structure against uplift pressure of underground water, the structural drawing issued by the respondent stipulated that the level of underground water shall be lowered and kept below the bottom of the raft (foundation) by continuous pumping till the top slab of the structure is cast. Thus the respondent himself ordered for continuous pumping during construction, so as to keep the underground water level below the bottom raft.

As stated by the claimant two pumps of 3HP were continuously kept running for 24 hours and 257 days. When there was increased flow of underground water due to rains or any other reason, in addition to two pumps, 3rd and sometimes 4th pump was also pressed into operation to keep the underground water level below the bottom raft. These additional pumps were withdrawn when the water level below raft starting falling due to reduction in flow of underground water due to stoppage of rain or any other reason.

I am also of the opinion that underground water is seepage water from subsoil acquifer or spring and is covered under the para 2.20.2 of CPWD specification and is payable to the claimant as per item no. 2.25 of DSR-93.

The Respondent had been maintaining logbooks of the pumps on shift to shift and day to day basis. On each day, the entries are recorded in 8 hours shift. The logbooks are signed by the pump operators of the claimant and JE/AE in-charge of work. The Engineer-in-charge occasionally checked and signed the logbooks. Thus, the logbooks are the basic original record jointly maintained by both parties at the time of execution of the work and in my opinion, this original record has to be accepted by both parties. I have examined the logbooks, the statement of respondent as recorded above in respect of periods of operation of 4 pumps is found correct. The 4 pumps have worked for the following period.

Pump No. 1: 257 days and 16 hours.

Pump No. 2: 257 days and 16 hours.

Pump No. 3: 126 days and 16 hours.

Pump No. 4: 82 days and 0 hours.

*Total for one pump = 257+257+126+82+48 hours or 2 days
= 724 days.*

There is no dispute or difference of opinion between the parties that the underground water was pumped out as per order of the respondent and as per the structural drawing and is payable as per condition no. 6 of the claimant's letter dated 6.12.96. The condition no. 6 stipulate that "Any work done below ground water shall be considered for extra payment as per CPWD specifications." Para 2.20.3.3 of CPWD specification 91-92 volume-I stipulates that "Pumping or bailing out water met within excavations from the sources specified in 2.20.1, where envisaged and specifically ordered in writing by the Engineer-in-charge shall be measured and paid. Quantity of water shall be recorded in kilo liters correct to two places of decimal. This payment shall be in addition to the payment under respective items of earth work and shall be admissible only when pumping or bailing out

water has been specially ordered by the engineer in charge.” Thus, the intention of the claimant was clear that the pumping of water shall be measured and paid in kiloliters as per specifications. Continuous pumping was done as per requirement of structural drawings and the Respondent. The record of running of pumps was maintained in logbooks signed by both parties. Hence, there is no dispute except the method of determination of rate of this extra item.

The method of determination of rate has been laid down in the clause -12 of the agreement. The rate has to be derived only as per clause-12. The clause-12 lays down the method of derivation of the rate as under in para 12.1.2. (only relevant portion reproduced below):

xxx xxx xxx xxx

In the present case, method described in sub-para-i)& ii above, cannot be applied as there is no item of pumping out underground water is available in the agreement. Next is sub-clause-iii). The rate for “pumping out water caused by springs, tidal or river seepage, broken water mains or drains and the like” is available in DSR-93 at item no. 2.25 on page -77. There is a note recorded in DSR-93 in respect of this item that “This pertains to only such pumping of water as is envisaged at the time of tendering and do not include those that need to be covered under contractual risks.” In my opinion, this condition is very well covered in this case because, anticipating pumping of underground water, the claimant quoted condition no. 6 in his letter dated 6.12.96. Further, the Claimant was order by the respondent to lower the underground water level below the bottom raft by continuous pumping. The rate of this item is Rs. 13.65 per kiloliter. The Respondent should have sanctioned the rate of this extra item as per DSR-93 plus 27.83% above. The rate thus, comes to Rs. 17.45 per kiloliter. It is incorrect on the part of the Respondent to sanction the rate by a method other than clause-12.1.2(iii). The Respondent has sanctioned the item with the following remark:

“As per the structural drawing for the work, the subsoil water level has to be lowered below the bed level till top slab is cast and excavated area is to be kept in dry condition. Hence, continuous pumping was necessary for this purpose. As per the terms of negotiation letter or the agreement, all work below ground water is payable extra. Even though, the pumping is done at 7 ltrs./sec by each pump and the cost is coming very huge on kiloliter basis as per DSR-93 item no. 2.25. The extra is prepared on actual logbooks basis. Since there is no provision in the agreement for de-watering item is initiated hence extra item. As the pumping has to be done

round the clock to keep the subsoil water level well below the bed level the pumps are to run continuously. To ensure this, at least one operator has to be kept at every time in three shifts till the top slab is cast which is to be done as per structural drawings. Hence extra item, as there is no provision in the agreement.”

In the above remark: The Respondent has accepted that discharge of each pump was 7 ltrs/sec and the rate is derived on the basis of item no. 2.25 of DSR-93, the cost will be very huge. Therefore, the respondent chose to ignore the provision of clause-12.1.2(iii) and sanction the rate on so called action logbook basis. The method adopted by the Respondent is not clear and is found incorrect and deserves to be set aside. Further, while sanctioning the extra item the Respondent has recorded following points (Refer Exhibit C-42 submitted by the claimant). (Only relevant portion reproduced)

- a) The structural drawing was issued to the Claimant on 24.2.97 after start of work and after negotiations were conducted. As per condition in the structural drawing the water table had to be kept well below the raft bottom. It does not merely necessitate bailing out of accumulated water as para-5 – (a) & (b). But, it stipulates continuous pumping to bring the water below the bottom of raft. This is only possible with the boring of number of borewells before hand so that uplift pressure of water on the raft can be avoided.*
- b) Rate of pumping for each pump was about 7 ltrs/sec as checked at site. However, the rate of pumping could not be changed/lowered after top treatment is laid and the subsoil water table should be kept well below the raft bottom and could not be allowed to rise. Hence, continuous pumping was required to keep subsoil water below the bottom as per depth of excavation for sumps, raft etc.*
- c) As per CPWD specifications, the payment shall be as per “kiloliter” basis as per clause no. 2.20.3.3. of CPWD specification 91-92 volume-I. However, considering the rate of pumping, at 7 liter/sec the amount of only one pump works out to about Rs.25.00 Lac, it is considered more prudent to pay the contractor on actual basis. As can be seen from the proposed extra item, the total element of extra payment in this regard for all the pumps is Rs.9.00 Lac including standby generator cost. The above clearly serves the government interest to the maximum extent and at the same time seems to be justified.*

- d) *As the payment is being proposed to be made on actual basis, based on logbooks, for every machinery worked and certified by the site staff and the Engineer-in-Charge or relevant document are maintained at site, which shall form basis of payment. Arrangements were made by the contractor for de-watering as per actual requirement of work at site and as per directions of Engineer-in-charge.*
- e) *The proposal is for compensation to the contractor on actual expenditure basis plus normal contractor's profit and overheads. As per contract schedule, the contractor need not execute the preventive pumping; hence it is not possible to estimate the possible actual expenditure as that condition was beyond imagination at this stage.*

The above recording of the Respondent on the file clearly shows that only in order to avoid the payment of large cost of extra item as per clause 12 of the agreement, the Respondent decided to sanction it on so called actual basis in gross violation of the agreement provisions. The Respondent was fully aware of actual cost as per Clause-12 based on DSR-93.

I am, therefore, fully convinced that the Respondent deliberately violated provisions of Clause-12 of the contract which has to be set aside. The Respondent had accepted that the discharge of each pump was 7 ltrs./sec. As mentioned above, on the basis of pumps operating as per log books, it comes equivalent to 1 pump operating for 723 days and 8 hours. At the end of the log book an abstract of operation of pumps has been prepared by the respondent and this figure of 723 days and 8 hours is taken from there as well as from the revised final bill. Therefore, on the basis of equivalent to one pump running for 723 days and 8 hours and at a rate of discharge of 7 ltrs./sec, the volume of water comes to 4,37,472 kiloliters. The claimed amount thus works to $\text{Rs.}4,37,472 \times 17.45 = \text{Rs.}76,33,886.40$. In the revised final bill paid on 16.8.2002, the Respondent has already paid Rs.8,59,051.30 against pumping of water. Thus, the net amount due to be paid comes to Rs.67,74,835.10 which is awarded."

14. In view of the aforesaid, I am of the opinion that learned Arbitrator has given cogent and concise reasons for awarding Claim

No.6 and has also relied upon log books maintained by the petitioner-objector itself. Moreover, as the parties had selected their own Forum, in my view, the deciding Forum must be conceded the power of appraisal of evidence. This is more so when the Arbitrator is a technical expert. It is further settled law that the arbitrator is the sole judge of quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge on the evidence before the arbitrator.

15. I am also of the view that respondent-claimant is entitled to benefit of Clause 10 CC in the present case as the contract was for a period of ten months. There is also no overlapping in the impugned Award insofar as it directs payment of Claims No. 2, 6 and 7 as Claims No. 2 and 6 are on account of extra items, whereas Claim No. 7 based on Clause 10 CC is compensation for escalation in prices.

16. As far as the award of rate of interest is concerned, I am of the view that the learned Arbitrator has granted the prevalent market rate of interest.

17. Consequently, except with regard to Claim No.1, impugned Award requires no interference. With the aforesaid observations, present petition and pending applications stand disposed of with no order as to costs. The amount deposited by the petitioner-objector in

this Court shall be released to respondent-claimant after a period of four weeks from today. Accordingly, list the present petition before the Registrar General of this Court on 12th April, 2010. The Registrar General would release the amount along with interest so deposited, by way of an account payee cheque in favour of respondent-claimant against a written receipt.

MANMOHAN,J

MARCH 05, 2010.

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