

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 2nd November, 2011
Judgment Pronounced on: 4th November, 2011

+ RFA(OS) 41/2010

NATIONAL HYDROELECTRIC POWER
CORPORATION LTD. Appellant
Through: Mr.Kailash Vasudev, Sr.Advocate
with Mr.Sachin Datta and
Ms.Gayatri Verma, Advocates

versus

JAIPRAKASH INDUSTRIES LTD & ANR Respondents
Through: Mr.Lovkesh Sawhney and
Mr.Durgesh Kumar Pandey,
Advocates

RFA(OS) 42/2010

NATIONAL HYDROELECTRIC POWER
CORPORATION LTD Appellant
Through: Mr.Kailash Vasudev, Sr.Advocate
with Mr.Sachin Datta and
Ms.Gayatri Verma, Advocates

versus

HINDUSTAN CONSTRUCTION CO. LTD.
& ANR. Respondents
Through: Mr.Gaurav Singh, Advocate

RFA(OS) 43/2010

NATIONAL HYDROELECTRIC POWER
CORPORATION LTD Appellant
Through: Mr.Kailash Vasudev, Sr.Advocate
with Mr.Sachin Datta and
Ms.Gayatri Verma, Advocates

versus

HINDUSTAN CONSTRUCTION CO. LTD.
& ANR. Respondents
Through: Mr.Gaurav Singh, Advocate

RFA(OS) 44/2010

NATIONAL HYDROELECTRIC POWER
CORPORATION LTD Appellant
Through: Mr.Kailash Vasudev, Sr.Advocate
with Mr.Sachin Datta and
Ms.Gayatri Verma, Advocates

versus

CONTINENTAL CONSTRUCTION LTD.
& ANR. Respondents
Through: Mr.Anil Dutt and Ms.Divya Jain,
Advocates for R-1

RFA(OS) 45/2010

NATIONAL HYDROELECTRIC POWER
CORPORATION LTD Appellant
Through: Mr.Kailash Vasudev, Sr.Advocate
with Mr.Sachin Datta and
Ms.Gayatri Verma, Advocates

versus

CONTINENTAL CONSTRUCTION LTD.
& ANR. Respondents
Through: Mr.Anil Dutt and Ms.Divya Jain,
Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P.GARG

1. Whether the Reporters of local papers may be allowed

to see the judgment?

2. To be referred to Reporter or not?

3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. At the outset it may be noted that the impugned order dated 11.2.2010 decides objections filed by the respondent under Section 30/33 of the Arbitration Act 1940 to an award made on 21.12.1996 by the sole arbitrator and the appeals have been filed under Section 39 of the Arbitration Act 1940. The appeals cannot be thus captioned as 'Regular First Appeal (OS)'. The appeals have to be captioned 'First Appeal against Order (OS)'. It is unfortunate that in spite of the Registry of this Court so intimating learned counsel for the appellant and requiring the appeals to be filed as per format applicable to a First Appeal against Order, the counsel has persisted to have the appeals laid before the Court as Regular First Appeals.

2. An unintentional error may be a mistake but persistence with an error, in spite of being cautioned to take reasonable care and rectify the error, would be a wrong and thus we would be perfectly justified in dismissing the Regular First Appeals filed against the impugned order as not maintainable, requiring the appellant to file First Appeal against Order. But we do not do so in the interest of justice and as conceded by learned senior counsel for the appellant, would treat the appeals as First Appeal against an Order i.e. 'FAO (OS)'.

3. Pertaining to a contract entered into between the appellant and the respondent, a dispute arose on the issue of payment to be made by the appellant to the respondent for the non-tendered extra items of work executed by the respondent.

4. The contract being an item rate contract, for non-specified works i.e. extra items or for analogous items not specified in the schedule of quantities, the applicable clause of the contract based whereon payment had to be made by the appellant to the respondent i.e. clause 18.2 (iii) provided as under:-

“18.2 (iii) Provided where some extra items and/or analogous items are not available in the Schedule of Quantities, and for the variation in respect of individual items exceeding the prescribed limit of 30% as aforesaid, the rates for such items(s) to be executed shall be determined by the Engineer-in-Charge on the basis of actual analyzed cost comprising of the cost of material to be supplied by the contractor (including transportation and taxes, levies if paid), labour actually engaged for the particular work, cost of operation of plant and machinery used for the work plus such percentage (as indicated in Schedule ‘D’) to cover the overheads, profits, contractor’s supervision and other charges, if any. The decision of the Engineer-in-Charge in deriving rates as aforesaid, shall be conclusive and binding on the contractor.”

5. The contract envisaged certain raw-material being supplied to the respondent by the appellant at a fixed price to be deducted from the running bills. The contract provides for a price escalation to be paid based on a formula under the contract i.e. as per clause 46.1 of the contract.

6. It is not in dispute that pertaining to extra works, raw-material supplied by the appellant to the respondent was consumed and while making payments under the running bills the appellant was determining the value of the work, for purposes of labour escalation being determined, by including the said raw material and from the amount so determined, price of the raw material was subtracted i.e. the labour input was with respect to all materials consumed and likewise pertaining to the cost of operation of plant and machinery, overheads, supervision charges, same method to finalize the running bills was being adopted. The dispute arose at the stage of settlement of the final bill and at this stage, with respect to determining labour and other charges payable, the appellant finalized the final bill by taking into account the cost of material consumed and after deducting the cost of the material supplied by it, worked out the labour cost payable on the balance. Same method was applied to determine other amounts payable towards operation of plant and machinery, overheads, supervision charges etc.

7. What was the result? With reference to an example, we can understand better. Say, for a work done, value of material supplied by the appellant was ₹100/- and value of the material brought and consumed by the respondent was also ₹100/-. 10% was the agreed labour cost. As per the basis adopted to clear the running bills, price towards labour payable was determined at $\text{₹100/-} + \text{₹100/-} = \text{₹200/-} \times 10\% = \text{₹20/-}$. As per the revised basis adopted by the

appellant, the labour cost payable was worked out at ₹100/- x 10% = ₹10/-.

8. Likewise, amounts payable towards cost of operation of plant and machinery, overheads and contractors' supervision were worked out and suffice would it be to state that the same resulted in lesser payment being determined to be paid by the appellant.

9. The justification of so doing, may be noted from the pleadings of the appellant before the learned Single Judge to the objections filed to the award dated 21.12.1996 by the learned sole arbitrator, who obviously held in favour of the version pleaded by the appellant and before the learned Single Judge, challenge to the award was by the respondent who had filed objections under Section 30/33 of the Arbitration Act 1940. The appellant, inter-alia, pleaded as under:-

“The materials are supplied by the corporation at fixed cost as per Schedule B of the contract. The cost of the materials supplied by the corporation is recovered during the payment of running bills of the contractor. The arrangement is only for account purpose to effect recovery. The cost of material supplied by the corporation is included for arriving at the rate as the same cost is recoverable after the payment of rate. But for applying 25% mark-up, the cost of the materials supplied by the corporation is excluded from the total cost as per GCC 18.2 (iii).”

10. The dispute before the arbitrator was whether the 25% point mark-up had to be applied to the value of the work on the total cost of material used or only on the cost of

material supplied by the respondent. It not being in dispute that 25% point mark-up had to be given effect to.

11. Whereas the stand of the respondent, is but obvious. The stand had to be the one which would bring in more money and obviously was that the mark-up had to be given effect to on the total value of the materials consumed and the stand of the appellant obviously was, the one which would render it liable to pay a less amount, i.e. as per its pleading noted in para 9 above.

12. After noting clause 18.2 (iii), the learned arbitrator agreed with the stand taken by the appellant and the reasoning of the learned arbitrator is as under:-

“In case of non-tender items of work which fall in the category of deviated and extra items, a special formula has been laid down in Clause 18.2(iii) for determining the cash amount payable to the contractor. Clause 18.2(iii) specifically mentions that the materials “supplied by the Contractor” will be included in determining the total cost, but does not mention that the costs of materials supplied by the Corporation will also be included. In case of deviated and extra items under Clause 18.2(iii), the cash amount payable as cost has to be determined purely on the basis of the actual cost incurred by the Contractor plus such percentage as is indicated in Schedule D. As there is no previously agreed total amount of consideration payable for the work under Clause 18, it has to be worked out on the basis of the norms laid down in Clause 18.2(iii). There being no previously agreed quantum of total consideration with an in-built cost of material in the amount payable, the question of adding the cost of materials to be supplied by the Corporation to the analyzed cost and then deducting the same

from that amount of consideration does not arise. The cash value of materials supplied by the Corporation in such a case becomes wholly irrelevant when the cost of the item of work is being determined in terms of formula laid down in Clause 18.2(iii).

The amount of cost for deviated and extra items of work has to be determined only on the basis of the terms of Clause 18.2(iii). When cost is determined under a special formula, it becomes a formula-based cost structure and it has to be determined strictly on the basis of the components required to be considered for determining the cost. Under Clause 18.2(iii), cost means actual analyzed cost, comprising of the various components mentioned therein. And, the mark-up of 25% mentioned in Schedule D is to be added only to the cost so determined under Clause 18.2(iii).

It has been contended by the Contractor that the “material to be supplied by the Contractor” in Clause 18.2(iii) means all the material used by the Contractor in the execution of the work, and that it is immaterial whether the source of supply of the material is the Corporation or the open market. The Corporation on the other hand pleads otherwise. There is no merit in the contention of the Contractor. Clause 23 of the General Conditions of Contract deals with the supply of materials. Under sub-clause 23.1, the Contractor has to provide and arrange at his own expense all materials “except those listed and specified in Schedule B”. Under sub-clause 23.4 again, the term “the materials listed in Schedule B which the Corporation has agreed to supply to the Contractor for the work under the contract” has been used which shows that the intention of the parties is to treat the material supplied by the Corporation as belonging to a separate class. In sub-clauses (i), (ii) and (iii) of Clause 23.4 and in various other clauses in the contract, there is a

clear indication that the material provided, issued, or supplied by the Corporation falls in a Special category. Clauses 23.1, 23.2 and 23.4 clearly make a distinction between materials supplied by the Contractor and the materials supplied by the Corporation. Source of supply is the determining factor. Even Special Condition 4 refers to issue of materials to the contractor for use in the execution of the work. The basic source of supply remains the Corporation. Special condition No.21.2 runs as under:-

“21.2 In the Contract, unless it is specifically provided that a particular facility, material or any other thing is to be provided by the Corporation at its own cost, it is agreed by the parties that the same shall be provided by the Contractor at his own cost.”

Clause 21.2 contemplates that all materials have to be supplied at the cost of the supplier. If the contractor supplies the material, it has to be at the contractor's cost. If the material is supplied by the Corporation, then it has to be at the Corporation's cost. It means that whoever incurs the cost in procuring the material or invests the money to obtain the material, will be deemed to be the supplier of that material. In the case of material supplied by the Corporation either in terms of Schedule B or in terms of Annexure A, total investment in procuring the material is made by the Corporation. At no point of time, the contractor invests any money in procuring these materials. The supplies under Schedule B or Annexure A must accordingly be deemed to be supplied by the Corporation and not by the contractor.

Further, in Clause 18.2(iii), except in respect of “materials”, no distinction has been made about the source of supply. In respect of operation of the plant and machinery used in the work, no mention is made about the source of procurement of supply. It is only in respect of cost of material

that the words “to be supplied by the contractor” have been used. It is thus apparent that the words “supplied by the Contractor” have been used to distinguish and exclude the material “supplied by the Corporation”. The supply of material by the Corporation is in response to its promise and obligation to do so under the contract and the contractor does not have to supply such material as is required to be supplied by the Corporation. It is obvious that materials supplied by the Corporation either in terms of Schedule B or Annexure A cannot be deemed to be materials supplied by the Contractor. The cost of such material cannot accordingly be added for determining the total cost which is to be calculated on the basis of “actual analyzed cost” of components mentioned in Clause 18.2(iii). The cost of material supplied by the Corporation either in terms of Schedule B or Annexure A not being a component for determining the total cost payable to the contractor cannot be taken into account for the purpose of enabling the mark-up under Schedule D, it has to remain out.”

13. The learned Single Judge has opined to the contrary and the reasoning, in paras 7 to 9 of the impugned judgment and order dated 11.2.2010 is as under:-

“7. One thing which needs to be clearly kept in mind, while deciding the interpretation of Clause 18.2(iii), is the spirit or the heart or the object of this Clause. In my opinion, the spirit of this provision is in the following line as found in the clause:

“..... labour actually engaged for the particular work, cost of operation of plant and machinery used for the work plus such percentage (as indicated in schedule D) to cover the

overheads, profits, contractor's supervision and other charges, if any.....”

I say that this line is the spirit and object of the clause because this line gives the reason for the mark-up given to a contractor i.e. the mark-up is for the elements of overheads, profits and other expenditure which has to be incurred by the contractor for the work done of the extra items. This line also makes it clear that overheads; supervision cost, other expenses and addition by way of profits are not to be confined only to the cost of the work of the extra/deviated items minus the cost of the material which is supplied by the respondent/employer but are applied to the total value of the extra work. Once we keep into focus this clear intent, purpose and the heart of Clause 18.2(iii), and so very much expressly stated in this very clause, things, in my opinion, automatically fall into place, and which clear object of the clause the arbitrator fell into a clear and apparent illegality in overlooking, and thereby has misconducted himself and the proceedings.

8. The intention of the parties to apply mark-up to the total value of extra work is also clear from a portion of Schedule B of the contract, however, whether it is unintentional one does not know. The said relevant portion of Schedule 'B' of the Contract though extremely relevant and necessary has not been reproduced by the Arbitrator though he has otherwise reproduced the other portions of Schedule B. That relevant portion of Schedule 'B' is as under:

“Materials for the work which will be issued to the contractor, cost whereof will be recovered

from the contractor at the rates mentioned below”

This line shows that the bill which has to be drawn for payment upon the respondent/employer-owner comprises of the total value of the work of the extra items/deviated items i.e. including the cost of material supplied by the respondent and cost has to be recovered from the contractor. The intention of this portion of Schedule ‘B’ is further clarified in paragraphs 23.4(i) and (vii) already reproduced above, and which paragraphs show that till the materials which are issued by the respondent are not incorporated in the works, they continue to be in trust with the objector and in ownership of respondent, however, once they are incorporated in the works, then not only the ownership therein of the respondent ceases, they become part of the work done by the contractor and have to form a part of the bill which is drawn upon the respondent for payment of that work and from which bill the employer ‘recovers’ the cost of material it supplies. Dilating further, what I am saying is that, the value of the work includes therein the total cost of entire material included in such work and not only a portion of the cost of material incorporated in the works as provided by the contractor. By the relevant language of Schedule ‘B’, Clauses 18.1; and 23.4(i) and (vii); the cost of the material supplied by the respondent necessarily becomes part of the bill and consequently also of the value and total cost of such work which has to be paid for by the respondent to the petitioner. Of course, since the material was in fact supplied by the respondent to the petitioner, ultimately when final payment has to be made, the value of this material supplied is

deducted/recovered from the amount of the bill. Let us take an example and a theoretical case to understand the mechanics. Suppose material which is incorporated in the work was supplied by a third person, and not the respondent, then, the petitioner would have had to pay the cost of material to such third person. In this case, such third person is the owner because certain material incorporated in the work is supplied by the owner-respondent and consequently the amount of such material is deducted/recovered by the owner before making payment of the Bill. The respondent, therefore, wears two hats at the same point of time i.e. one of an owner and one of the supplier. In the hat of the employer/owner the respondent is bound to pay for the work done of the extra items/deviated items and when it puts on such hat of such employer/owner it pays for the cost of the work done, but, when it puts on the different hat of a supplier of materials, it takes the cost/price with respect to the material which is supplied to the contractor/objector by reducing/recovering from the Bill the value of the material which it supplies. In view of the aforesaid discussion and the observations, when we accordingly look at the expression as found in clause 18.2(iii) of "material to be supplied by the contractor", it becomes very clear that the material to be supplied by the contractor is very much the total value of the extra work because it is for this total value of extra work which is done by the contractor that the contractor raises a bill upon the respondent for payment, subject of course, to adjustment of reduction therefrom of the value of the material which the respondent supplies to the petitioner. Be it noted that the words used in this clause are "material supplied

by the contractor” and not the “net value of material supplied by the contractor although stated otherwise in the Bill”.

9. That the interpretation which is being adopted by me, is the only possible interpretation for a reasonable man to have taken in the admitted facts and circumstances and the applicable clauses of the contract, is strengthened when we refer to the expressions of “labour, cost of operation of plant and machinery” as found in Clause 18.2(iii). The expression “material” as found in Clause 18.2(iii) in the scheme of the contract, has surely to be read *noscitur a sociis* with the expressions “labour cost, cost of plant and machinery” used for the work pertaining to extra items/deviated items. The mark up is on the total of the cost of ingredients of labour, machinery etc. employed in the work, and it is nobody’s contention that the labour cost or cost of operation of plant and machinery contained in an extra item/deviated items is broken up into two parts, one part of such cost of labour and running cost of plant and machinery attributable to the cost of material supplied by the employer and which is to be reduced from the bills which are raised in accordance with Clause 18.2(iii) and the other part of labour or machinery cost attributable to the material supplied by the petitioner is to be paid for under the bills. The line which is found in Clause 18.2(iii) runs continuously from “material” till “the cost of operation of plant and machinery”, and it is not that such line and expressions therein, can be merely for the convenience of the respondent, bifurcated in two parts, one part till material and other part till machinery. Once the cost of labour and cost of running of plant and

machinery is taken as a whole with respect to the extra items/deviated items for marking up purposes, i.e. not removing from such ingredients of the work that proportion attributable to the value of the work pertaining to the cost of material supplied by the respondent, then, I do not find any valid basis to cut down the scope of expression "cost of material to be supplied by the contractor" only to the material which is supplied by the contractor and not the total material incorporated in the work of extra deviated items. A clear case for application of the maxim *noscitur a sociis*. When we take such reading of this clause, it becomes abundantly clear, read alongwith heart of this provision being the intention of the contract to give a mark up to the contractor on what is the total cost and value of an extra work/deviated items, we find that the Arbitrator has strived to interpret the clause in a direction which gives his finding a colour of perversity. A perverse reading of the clause so as to read therein a meaning, which on a complete reading of the clause and the other applicable clauses, defeats the very intention of giving mark-up for the value of the additional extra items/deviated items amounts to the Arbitrator misconducting himself and the proceedings."

14. Challenging the impugned decision, Sh.Kailash Vasdev learned senior counsel for the appellant urged that it is settled law that an arbitrator is the final judge to interpret a contract between the parties and drawing our attention to the award, relevant portions whereof which have been noted hereinabove in para 12, it was highlighted that the learned arbitrator has gone into the issue. Counsel highlighted that

the view taken by the arbitrator is a correct view and without going into the merits of the view taken by the learned Single Judge, upon the premise that the said view was also a possible view, learned senior counsel urged that it was settled law that where two views were possible to be taken with respect to the interpretation of an agreement, a Court cannot substitute its view from the one taken by the arbitrator. So arguing, learned counsel hastened to add that the view taken by the learned arbitrator was the only view possible.

15. We have extracted hereinabove in para 4 above clause 18.2 (iii) which is at the center of the debate and we re-note the same by breaking its conceptual whole into identifiable limbs. We break the same as follows:-

Where some extra items and/or analogous items are not available in the Schedule of Quantities, and for the variation in respect of individual items exceeding the prescribed limit of 30% as aforesaid,

the rates for such items(s) to be executed shall be determined by the Engineer-in-Charge

on the basis of actual analyzed cost

(a) comprising of the cost of material to be supplied by the contractor (including transportation and taxes, levies if paid),

(b) labour actually engaged for the particular work,

(c) cost of operation of plant and machinery used for the work

(d) plus such percentage (as indicated in Schedule 'D') to cover the (i) overheads, (ii) profits, (iii) contractor's supervision and (iv) other charges, if any.

16. The clause analysis, as aforesaid done by us, would make it clear that the subject of the clause is the situation where extra items or work, not available in the Schedule of Quantities, have been executed by the respondent requiring price payable for said work to be determined.

17. The second limb of the clause requires not one, but four determined constants to be worked out and the same are (a) cost of material to be supplied by the contractor (b) labour actually engaged for the particular work, (c) cost of operation of plant and machinery used for the work (d) plus such percentage (as indicated in Schedule 'D') to cover the (i) overheads, (ii) profits, (iii) contractor's supervision and (iv) other charges, if any.

18. Now, the words '*the particular works*' pertaining to the labour element and the words '*the work*' pertaining to the cost of operation of the plant and machinery are of importance, and the learned Single Judge has rightly opined that the learned arbitrator has totally misread the clause in question. As broken up by us, it is apparent that while working out the effect of clause 18.2 (iii) of the contract, labour charges have to be paid for the labour engaged for the extra work and in relation to operation of plant and machinery the price has to be paid for the extra work and this would mean irrespective of whether a particular raw material consumed in the work was supplied by the appellant or was brought at site by the respondent, the labour and costs for operating plant and machinery as also supervision charges had to be for the entire work.

19. The matter can be looked at from another angle. The clause in question requires, for extra work done, reimbursement to the contractor for the cost of material supplied by the contractor and thus the cost of material supplied by the owner of the work has expressly been excluded, but qua labour actually engaged and cost of operation of plant and machinery, the reimbursement has to be for '*the work*'. The work would mean the resultant work ensuing from the labour spent and the machinery used to work upon the materials supplied either by the contractor or the owner of the work. Thus, the said elements emanate from or with respect to the work and not the material for the reason when individual components are put together by spending labour and using machinery, a work i.e. a new entity comes into existence.

20. There is no dispute with the proposition that an arbitrator is the final judge to interpret a contract or a clause within a contract between the parties. But that would not mean that his ipse dixit would be accepted. If the reasoning of the arbitrator shows that he has digested every word, phrase and sentence in a clause and thereafter reflected thereon, howsoever faulty may be the reasoning, subject to the fault not reaching the level of perversity, the award would be immune for challenge before a Court. But, where it is evidenced that the learned arbitrator has ignored words, phrases or sentences in a clause while interpreting the same, it would amount to an arbitrator misconducting himself inasmuch as it would be a case of a legal misconduct. Legal

misconduct would embrace a situation where the person required to adjudicate a lis ignores words, phrases or sentences in a clause since this would amount to the arbitrator substituting the contract between the parties and needless to state the arbitrator would breach the mandate to the arbitrator i.e. enforce the contract between the parties.

21. We adopt the reasoning of the learned Single Judge as also the illustrations given by the learned Single Judge as per para 7 to 9 of the impugned decision, which we have extracted hereinabove in para 13 above and the same may be read as part of our reasoning; supplementing the same with our reasoning hereinabove, we dismiss the appeals and as per the ethos of the impugned decision, leave the parties to bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(S.P.GARG)
JUDGE

NOVEMBER 04, 2011
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