

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

Judgment reserved on: 14.09.2011

% **Judgment delivered on: 19.09.2011**

+ **O.M.P. 496/2010**

GOVT OF NCT OF DELHI Petitioner
Through: Ms. Zubeda Begum and Ms. Sana
Ansari, Advocates

versus

M/S MBL INFRASTRUCTURE LTD Respondent
Through: Ms. Anusuya Salwan and Ms. Neha
Mittal, Advocates

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may
be allowed to see the judgment? : No
2. To be referred to the Reporters or not? : Yes
3. Whether the judgment should be reported
in the Digest? : Yes

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner-Government of National Capital Territory of Delhi (GNCTD) has filed this petition under Section 34 of the Arbitration & Conciliation Act, 1996 (the Act) to assail the arbitral award dated 11.05.2010 passed by Shri S.P. Banwait, Sole Arbitrator, whereby he has re-affirmed his finding contained in his earlier award dated 15.06.2009 to the effect that the petitioner herein, who was the

respondent before the Arbitral Tribunal, is liable to pay service tax to the respondent/claimant.

2. The petitioner awarded the contract for comprehensive maintenance of Ring Road and Outer Ring Road for a period of three years to the respondent-contractor. The stipulated date of start of the contract was 24.08.2005 and the stipulated date of completion was 23.08.2008.

3. Disputes arose between the parties during the currency of the work which were first referred to the Dispute Resolution Expert by the Chief Engineer, PWD Maintenance Zone M-3 in terms of para 21.1 of the General Conditions of Contract (GCC). The recommendations of the Dispute Resolution Expert were not acceptable to the respondent-claimant. Accordingly, he invoked Clause 22 of the GCC which contains the arbitration agreement between the parties and called upon the Chief Engineer to refer the disputes to arbitration. Consequently, the Arbitrator was appointed.

4. The learned Arbitrator made his award dated 15.06.2009, awarding the claims of the respondent-claimant. It was held that the petitioner was liable to pay service tax leviable on the service rendered by the respondent-contractor to the petitioner so that the same could be deposited with the Government Exchequer. However, while rendering the said award the learned Arbitrator took into account an office memorandum dated 28.01.2009, whereby Clauses 37 and 38 of the GCC were amended.

5. The petitioner, aggrieved by the award dated 15.06.2009, assailed the same before this Court by filing O.M.P. No. 578/2009 under Section 34 of the Act. This Court set aside the said award as the learned Arbitrator had taken into account the aforesaid document of his own accord, without bringing the same to the notice of the petitioner. The matter was remanded back to the Arbitrator for re-hearing and for passing an award in accordance with law. Resultantly, the parties appeared before the learned Arbitrator who, after granting a hearing on 22.04.2010, rendered his award dated 11.05.2010, which is now under challenge.

6. The claim of the respondent-claimant before the Arbitral Tribunal was that the respondent submitted the tender for the contract in question on 15.04.2005. It was the respondent's case that the rates tendered by the respondent had been worked out by considering the taxes & levies, as applicable on the crucial date, i.e., 15.04.2005. Service tax was not applicable to road maintenance as on 15.04.2005. The tender of the respondent was accepted vide letter dated 06.07.2005. The formal contract was executed on 24.08.2005. The Ministry of Finance issued a notification dated 27.07.2005 (Exhibit C-2). By virtue of para 16.2 of this notification, road maintenance works/services were brought under the regime of service tax w.e.f. 16.06.2005. The respondent started claiming service tax from the petitioner as a result of the aforesaid development. The respondent also deposited an amount of Rs.5 Lakhs as service tax with the Service Tax Department to avoid prosecution.

7. On the other hand, the petitioner refuted the said claim of the respondent-claimant. The petitioner submitted that prior to tendering for the said works, in a pre-bid conference, the petitioner had specifically raised the following query:

“As per the recent order by the Central Government, the Service Tax @ 10.2% is to be leviable on all services provided by the Contractor to any agency. In this case, the contractor has to collect the Service Tax from the client and deposit the same with the Excise Department within the prescribed period. Kindly clarify the mode of payment of Service Tax by PWD.”

8. The petitioner had responded by giving the following clarification:

“PWD is not paying any service tax to its contractors undertaking road maintenance works, therefore, no service tax shall be paid to the contractor, under this contract.”

9. Only thereafter the respondent had submitted its bid, with open eyes, while being aware that the petitioner would not pay service tax. The respondent also sought to place reliance on Condition No. 13.3 of the contract, which reads that:

“All duties, taxes, royalties and other levies payable by the bidder under the contract, and under applicable laws or for any other cause, shall be included in the rates, prices and total bid price submitted by the bidder.”

10. As aforesaid, the learned Arbitrator vide his award dated 11.05.2010 has again allowed the respondent's claim. The reasoning given by the learned Arbitrator is that as on the date of the submission

of the bids, i.e., 15.04.2005, service tax was not applicable to the road maintenance works. Consequently the stand of the petitioner taken in the pre-bid conference that the petitioner was not liable to pay service tax on road maintenance works was correct in the light of the fact that there was no such tax levied by law on that day. He further held that the mere knowledge of the respondent that, in future, service tax would be levied on road maintenance works could not be taken cognizance of, in the absence of a notification covering such services within the ambit of service tax. Since service tax was imposed w.e.f. 16.06.2005, i.e., after the receipt of the bids for the contracts, the same was liable to be reimbursed to the respondent by the petitioner.

11. Learned counsel for the petitioner lays stress on the query raised by the respondent in the pre-bid conference and the response thereto given by the petitioner. She submits that from a reading of the query it is evident that the respondent proceeded on the basis that service tax at the rate of 10.2% is leviable on the service in question i.e. of road maintenance. All that the respondent desired to know, while raising a query, was with regard to the mode of payment of service tax by PWD. In the mind of the respondent there was never any doubt that service tax was leviable on the service in question. She further submits that the reply of the petitioner is also very relevant in the present context. She submits that the reply of the petitioner was that PWD is not paying any service tax to its Contractors undertaking road maintenance works and, therefore, the petitioner categorically stated that *"no service tax shall be paid to the Contractor, under this*

contract.” The respondent was explicitly put to notice that nothing extra shall be paid on account of service tax to the Contractor. She submits that the respondent-contractor should have tendered its bids accordingly. She further submits that under condition No.13.3, all duties, taxes, royalties and other levies payable by the bidder under the contract, and under applicable laws or for any other cause, were included in the rates, prices and total bid price submitted by the bidder. Consequently, the bidder could not demand any extra amount on account of any duty, taxes or levies.

12. Learned counsel for the petitioner further submits that the impugned award is contrary to the contractual terms and the learned Arbitrator has acted beyond his jurisdiction by acting contrary to the contract. In support of her submission, she places reliance on the decision of the Supreme Court in ***M/s Rashtriya Chemicals & Fertilizers Ltd V. M/s. Chowgule Brothers & Ors***, AIR 2010 SC 3543.

13. On the other hand, learned counsel for the respondent supports the impugned award. She submits that levy of service tax is an indirect tax which is required to be collected from the consumer of the service in question. The provider of the service merely acts as an agency to collect the said tax. She submits that on the day when the bid was submitted i.e. 15.04.2005, as a matter of fact, service tax was not leviable on the road maintenance works. The respondent, therefore, did not include the component of service tax while making its bid. Condition 13.3 would be applicable only in respect of such of

the taxes and levies which were payable on the day when the bid was made and would not include levies and duties, which came into force after the submission of the bids. In this regard she lays specific emphasis on the words “*under applicable laws*” found in Condition No.13.3. She also places reliance on the decision of this Court in ***Pearey Lal Bhawan Association V. Satya Developers Pvt. Ltd***, 173 (2010) DLT 685 and ***Food Corporation of India V M/s A.M.Ahmed & Co. and Anr***, JT 2006 (10) SC 62.

14. The examination of an arbitral award by this Court, under Section 34 of the Act, can be done on limited grounds. While examining the award, the Court does not sit as an appellate Court. If the view taken by the learned Arbitrator is a plausible view, the Court would be loathe to interfere with the award.

15. No doubt, when the respondent raised its query in the pre-bid conference, the respondent proceeded on the assumption that service tax is leviable on road maintenance services. The query pertained to the mode of collection of service tax, and not whether service tax is leviable to the work, and would be paid by the petitioner or not. The answer of the petitioner that “*PWD is not paying any service tax to its Contractors undertaking road maintenance works, therefore, no service tax shall be paid to the Contractor, under this contract*” has to be understood in the context of the legal position prevailing on the day when the query was answered. As a matter of fact, on the day when the query was answered, PWD was not paying service tax to its Contractors undertaking road maintenance works. This was because

there was no such levy in force. Therefore, the petitioner could possibly not have answered the query in any other way, but to state that service tax shall not be paid to the Contractor under the contract in question. The petitioner did not respond to a hypothetical situation – that if service tax is leviable under the law, whether the same would be paid by the petitioner or not. This is because it was not for the petitioner, or even the respondent, to foresee that in future, service tax would become applicable to the contract in question. Therefore, it cannot be said that when the respondent made its bid on 15.04.2005, the respondent was aware that, in future, service tax would be levied on road maintenance services, and that even in such an eventuality, the petitioner would deny payment of the tax to the respondent.

16. Reliance on Condition No. 13.3 placed by the petitioner also appears to be misplaced. Clause 13 forms part of the NIT document. It is contained in the instructions to bidders. Clause 13 deals with the aspect of “Price Bid”. Therefore, condition No. 13.3 is applicable in respect of duties, taxes, royalties and other levies, which were payable by the Contractor under applicable laws on the day when the bid was made. The Contractor could include such duties, taxes, royalties and other levies in his rates only because they were pre existing on the day when the bid was made. Obviously, a bidder could not be expected to include in its bid even those taxes and levies which were not in force on the day when the bid was made and came to be levied only subsequently.

17. Reliance placed by learned counsel for the petitioner on **Rashtriya Chemicals** (supra) is misplaced. The contractual clause considered by the Supreme Court in that case, namely, Clause 2.03 provided that if the petitioner company gives one month's notice to extend the contract for a further period of one year from the expiry of the period mentioned in Clause 2.01, the Contractor shall be bound to continue to do the work and render services on the same terms and conditions as contained in the contract during such extended period, except for the statutory increase in the wages of Dock Labour allowed by the Dock Labour Board. The note appended to Clause 2.03 further made it clear that *"The rates indicated against first and 2nd year above have been taken from MDLE'S Circulars from time to time. But the rates at which the contract is initially awarded shall remain firm throughout the period of one year from the date of award and shall not be subject to any escalation whatsoever. Similarly, the rates allowed for the extended period of one year, if any, after considering the statutory increase, if any, in the wages of Dock Labour will also remain firm throughout the extended period of one year and shall not be subject to any escalation whatsoever, irrespective of any subsequent increase in the wages of Dock Labour allowed retrospectively by the Mormugao Dock Labour Board."*

18. It was in this background that the Supreme Court interpreted Clause 2.03 and the note appended thereto, to mean that the Contractor was not entitled to increase any rates during the extended period. Consequently, the Court held that the award of the Arbitrator

directing payment of additional amount to the Contractor on account of increased wages was contrary to the contractual terms, and was liable to be set aside. This decision does not apply to the present case, as in the present case there is no term of the contract which stipulates that levy of any additional taxes or duties during the currency of the contract shall have to be borne by the respondent Contractor.

19. This Court in **Pearey Lal Bhawan** (supra) considered the issue whether the burden of service tax, levied on the service or facility of leasing should be borne by the lessor, (i.e. service provider) or the lessee, (i.e. the user). The Court observed that there was no dispute that the parties at the time of execution of the lease, did not visualize that this kind of a levy would be made in respect of lease or rental of commercial properties. It was also not disputed that the levy was made effective after the parties had entered into the agreement. The lessee denied the liability to pay by contending that the conditions of the contract stipulated that all taxes etc. are to be borne by the landlord. By placing reliance upon the decisions of the Supreme Court in **All India Federation of Tax Practitioners V. Union of India**, (2007) 7 SCC 527; and, **All India Taxpayers Welfare Association V. Union of India & Ors.**, (2006) 4 STR 14 and Section 12 A of the Central Excise Act, this Court in paragraph 14, observed as follows:-

“14. It is true, that the contracts entered into between the parties in this case, spoke of the plaintiff lessor’s liability to pay municipal, local and other taxes, in at least two places. The Court, however, is not unmindful of the circumstance that service tax is a species of levy which the parties clearly did not envision, while entering into their

arrangement. It is not denied that leasing, and renting premises was included as a "service" and made exigible to service tax, by an amendment; the rate of tax to be collected, is not denied. If the overall objective of the levy – as explained by the Supreme Court, were to be taken into consideration, it is the service which is taxed, and the levy is an indirect one, which necessarily means that the user has to bear it. The rationale why this logic has to be accepted is that the ultimate consumer has contact with the user; it is from them that the levy would eventually be realized, by including the amount of tax in the cost of the service (or goods)."

20. After referring to Section 64-A of the Sale of Goods Act, which visualizes and provides for situations where levies of tax are imposed after the contract (for sale of goods) is entered into, the Court further observed:-

"The above provision also clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. Although there is no explicit provision to that effect, enabling lessors such as the plaintiff, to the service tax component, this Court is of the view that there is sufficient internal indication in the Act, through Section 83 read with Section 12-A and Section 12-B suggesting that the levy is an indirect tax, which can be collected from the user (in this case, the lessee). This issue, is therefore, answered in the plaintiff's favour, and against the defendant."

21. In the facts of the present case, it can be said that the parties did not envision, while entering into their agreement, that service tax would be levied in future on road maintenance services.

22. From the above discussion, to me, it appears that the view taken by the learned Arbitrator in the impugned award cannot be said to be a wholly implausible view. In fact, the same appears to be a reasonable view in the facts and circumstances of this case. I therefore, find no merit in this petition and dismiss the same.

(VIPIN SANGHI)
JUDGE

SEPTEMBER 19, 2011

'BSR'/AS