

IN THE HIGH COURT OF DELHI AT NEW DELHI

Arb. P. No. 206 of 2004 & IA No.3802 of 2005

Reserved on: 20th July, 2012
Decision on: 6th August, 2012

M/S. PEE TEE ENGINEERING ASSOCIATES Petitioner
Through: Mr. Nikhil Nayyar with
Ms. Pritha Srikumar Iyer, Advocates.

versus

BHARAT HEAVY ELECTRICALS LTD.
& ANR. Respondents
Through: Mr. B.K. Satija, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
06.08.2012

1. These are the objections filed by Bharat Heavy Electricals Ltd. ('BHEL') under Sections 30 and 33 of the Arbitration Act, 1940 ('1940 Act') to the Award dated 16th July 2004 passed by the sole Arbitrator in the disputes between BHEL and M/s. Pee Tee Engineering Associates ('PTEA').

2. The background to the passing of the above Award is that a contract was entered into between the parties on 8th July 1991 for the work of construction of a multi-storied building for the Human Resources Development Institute in Sector-16A, NOIDA. When the disputes that arose could not be resolved, PTEA filed Suit No. 867 of 1993 in this court under Section 20 of the 1940 Act seeking reference of the disputes to arbitration. While the suit was pending, BHEL on 19th April 1993 terminated the contract on the ground of alleged defects in the work. On 16th November 1993 BHEL appointed Mr.

M.K. Kaushik, its Deputy General Manager, as the Arbitrator. When the said Arbitrator did not proceed with the reference, PTEA filed an application in Suit No. 867 of 1993 seeking termination of the mandate of the Arbitrator.

3. On 6th June 1996, BHEL formed a Committee of General Managers for the purpose of arriving at a negotiated settlement with the Petitioner. On 3rd March 1998, the parties arrived at an amicable settlement which was recorded in the Minutes of the Meeting ('MOM') of that date. The terms of settlement were as follows:

- “1. BHEL will pay to M/s. PTEA an amount of Rs. 25 lakhs (Rupees twenty five lakhs) towards full and final settlement for all the items for the HRDI contract only.
2. BHEL shall write to United Bank of India, CR Park, New Delhi – 110019 for discharging of security deposit for Rs. 5 lakhs given through Bank Guarantee No. LG 1/92 DL 2/4/92 which was kept alive by order of Delhi High Court.
3. From this gross payable amount settled, applicable statutory recoveries for UPST & IT will be made.
4. M/s. PTEA shall withdraw all the Court cases relating to this HRDI contract pending in Delhi High Court and give an affidavit to this effect to BHEL.
5. BHEL shall make payment within 30 days after signing of this MOM and submission of affidavit for withdrawal of court cases.
6. No further claims of either party will survive after this settlement/MOM agreement.”

4. In terms of the above settlement PTEA agreed to receive a sum of Rs.25 lakh under full and final settlement of its claim of Rs.68.65 lakhs. The payment was to be made by BHEL within 30 days thereafter. When BHEL failed to make the payment as agreed, PTEA issued notices on 15th May 1998 and 23rd October 1998 demanding interest from 2nd April 1998

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onwards. In the pending Suit No. 867 of 1993, BHEL made a statement on 19th November 1998 that it would perform its part of the obligation as contained in the agreement “positively within the first week of January 1999.” Recording the above statement, this Court on 19th November 1998 passed the following order:-

“S. No. 867 of 1993

An application has been filed by the Plaintiff seeking permission to withdraw the suit in view of the settlement arrived at between the parties, on 3rd March 1998. The terms and conditions of the settlement are mentioned in Annexure –P1 to the said application registered as I.A. No. 2778 of 1998, which is signed by the Plaintiff as also on behalf of the Defendants.

Counsel for the Defendants state that the Defendants would perform their part of the obligation as contained in the aforesaid agreement, positively within the first week of January 1999.

Renotify on 14th January 1999.”

5. BHEL did not make payment as undertaken. Instead it filed an application IA No.328 of 1999 seeking extension of time. In the said application, the following order was passed by the Court on 14th January 1999:

“I.A. No. 328 of 1999

This is an application filed by the Respondent seeking further time to pay the amount due and payable by the Respondent to the Petitioner in view of the circumstances explained in this application.

I have heard the learned counsel appearing for the applicant/Respondent as also the counsel appearing for the Petitioner.

Counsel for the Petitioner fairly states that the Petitioner is ready and willing to furnish an undertaking to this Court that if the amount is found legally due and recoverable from the Petitioner in respect of this contract as also in respect of the other contracts, the same could be recovered and/or adjusted from the dues of the Petitioner and/or shall be paid by the Petitioner to the Respondent. Let such an undertaking be filed and kept along with the records of this case.

In view of the aforesaid statement coming from the Petitioner and as stated before this Court by the counsel appearing for the Petitioner, I direct that the Respondent shall pay the entire amount in terms of the last order to the Petitioner through cheque within two weeks from today and the cheque drawn in favour of the Petitioner shall be brought to this Court on 1st February 1999. Undertaking to be foiled by the Petitioner shall also be filed before the next date.

The bank guarantee furnished by the Petitioner shall also be brought to the Court on 1st February 1999 so that necessary steps for releasing the same could be taken.

Let a copy of this order be given Dasti to the counsel appearing for the parties.”

6. The effect of the above order was that the Petitioner undertook that if any amount was found legally due and recoverable in respect of the said contract and any other contracts, the same could be recovered from the other contracts. Therefore, BHEL was expected to make payment of the entire settlement amount to PTEA within two weeks. BHEL did not comply with the above order but filed another application being IA No.954 of 1999 seeking modification. In the said application, the following order was passed on 1st February 1999:

“IA No. 954 of 1999 in S.No. 867 of 1993

An application has been filed by the Respondents seeking for modification of the order dated 14th January 1999.

Issue notice. Counsel for the Petitioner accepts notice. Reply, if any, shall be filed within two weeks. Rejoinder thereto, if any, shall be filed before the next date.

Counsel for the Respondents has placed on record a cheque for an amount of Rs. 14,05,714.36 as part payment, in terms of the last order.

The Respondents were directed to pay the entire amount of Rs. 25 lakhs through cheque drawn in favour of the Petitioner. Since an application has been filed by the Respondents seeking for modification of the aforesaid order, I direct that the said cheque drawn in favour of the Petitioner be handed over to the counsel appearing for the Petitioner, which is so handed over and received by the Petitioner, without prejudice to the rights and contentions of the parties in the present proceedings. The Respondent is directed to deposit the balance amount of Rs. 10,11,785.64 in the Registry of this Court, which on deposit shall be deposited in a fixed deposit account, for 45 days, in the name of the Registrar of this Court, within two days from today.

In terms of the last order, the Respondents have brought to the Court the bank guarantees furnished by the Petitioner. In view of the order passed herein today, these bank guarantees furnished by the Plaintiff stand released by the Defendants in original and the Petitioner stands discharged from the liability.

Put up on 19th May 1999.”

7. On 12th October 2000, out of the total amount deposited in the Registry a sum of Rs.5,75,000 was directed to be released in favour of PTEA. On 31st January 2001, Suit No.867 of 1993 was disposed of by appointing a retired

Judge of this Court as sole Arbitrator. The relevant portion of the said order reads as under:

“It was recorded earlier that in terms of settlement between the parties a sum of Rs. 14 lakhs was paid by the Defendant. A sum of Rs. 10 lakhs was deposited in this Court. Out of which, Rs. 5.75 (lakhs) was paid to the Plaintiff in terms of order dated 12th October 2000.

The disputes are now confined to the balance amount of Rs. 4.38 lakhs which is to be resolved by the Arbitrator.

Counsel for the Plaintiff claims interest. He states that payment was to be made by the Defendant within 30 days of the Memorandum dated 3rd March 1998. This is a matter that has to be decided by the Arbitrator.

With the aforesaid observations, the suit stands disposed of.”

8. There were three claims in the arbitral proceedings made by PTEA. Claim No.1 was for Rs.4,38,000 being the balance due to PTEA from BHEL. Claim No.2 was for interest on the amounts for different periods at 24% per annum with effect from 2nd April 1998 till the date of payment. Interest was claimed on Rs.14,05,714.36 for the period from 2nd April 1998 till 31st January 1999. Interest was also claimed at the same rate on Rs.5,75,000 from 2nd April 1998 to 11th October 2000. Claim No.3 was for Rs.50,000 as arbitration costs.

9. Before the learned Arbitrator, it was contended by BHEL that nothing was due to PTEA on account of adjustments and recoveries made by it. The following amounts were stated to have been recovered/ adjusted by BHEL from what was due to PTEA:

“(1) Towards loss of interest on security deposit on account of the Chief Technical Examiner (CTE)’s recommendations	Rs. 2,75,626.48
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(2) Towards photography charges	Rs. 3,200
(3) Towards testing charges for cement	Rs. 3,080
(4) Towards testing charges for steel	Rs. 2,900
(5) Towards insurance cover	Rs. 1,11,627
(6) Towards recovery of Sales Tax in respect of another work of construction of primary school for which the contract was awarded in 1989 and was got completed in January 1991	Rs. 40,000”

10. PTEA disputed all of the above amounts stating that in terms of the settlement recorded in the MOM dated 3rd March 1998 no further claims could be made by or against either party thereafter. The notice of such recoveries was given by BHEL to PTEA for the first time on 21st October 1998. Further BHEL only mentioned making a recovery of Rs.2,75,626.50 for estimated loss in interest earning. BHEL submitted before the learned Arbitrator that under Clause 3.3(viii) of the contract no interest was payable on the earnest money, security deposit or any money due to PTEA. Reference was also made to a report of the Central Vigilance Commission (‘CVC’) to justify the recoveries in the sum of Rs.2,75,626.50.

11. The learned Arbitrator concluded that the MOM recorded a settlement between the parties on 3rd March 1998 and it constituted a novatio of the contract. Further, even if there was a report dated 15th November 1996 of the CVC, a copy of which was not placed before the learned Arbitrator, it was earlier to the settlement dated 3rd March 1998. Therefore, the amount stated to be recoverable in terms of the report of the CVC was obviously taken into consideration by BHEL while arriving at the settlement on 3rd March 1998. Consequently, it was held that there was no justification for BHEL to make recoveries/adjustment of Rs.2,75,626.48 from the amount due to PTEA. The learned Arbitrator then examined each of the other

recoveries sought to be made by the BHEL and found that these were also not justified after the settlement recorded in the MOM dated 3rd March 1998. BHEL had contended before the learned Arbitrator that on a conjoint reading of Clauses 26.3 and 26.4 of the contract, BHEL could recover Rs.40,000 on account of sales tax even though it was in respect of another contract. PTEA pointed out that the said amount was sought to be recovered, for the first time in the arbitration proceedings. The learned Arbitrator accepted the plea of PTEA that such recovery of Rs.40,000 could not be made after the settlement between the parties.

12. The learned Arbitrator then addressed the issue of payment of interest. It was held that BHEL had no justification for the delay in making payment to PTEA after matter was settled in terms of the MOM dated 3rd March 1998. The learned Arbitrator noted that BHEL had pressed the same clause into service in another arbitration between the same parties in respect of '72 flats' in which he had passed an Award on 17th October 2003. He held that for reasons stated in the said Award, in the present case also Clause 3.3(viii) would not bar the claim for interest. The only distinguishing feature was that in the settlement recorded in the earlier case, it was stated that "appropriate interest" would be payable whereas in the present case it was not so stated. Yet, it was held, it would not make any difference to the law on the subject. In conclusion, the learned Arbitrator held as under:

"I, therefore, award interest @ 15% per annum to the Claimant on Rs. 14,05,714.36P with effect from 2nd April 1998 to 31st January 1999 since this amount was paid on 1st February 1999. Therefore, interest for 10 months on this amount works out to Rs. 1,75,715 to be paid by the Respondent to the Claimant. Further, on Rs. 5,75,500, I award interest @ 15% per annum from 2nd April 1998 to 11th October 2000 as this amount was paid to the Claimant in Court on 12th October 2000. Therefore, for 2-1/2 half years, the interest on this amount works out to Rs. 2,15,625 to be paid by the Respondent to the Claimant.

75. Since I have held that the Respondent had no justification to adjust any amounts as it sought to adjust and recover from the amount of Rs. 4,36,785.64P, I have awarded this amount in favour of the Claimant against the Respondent. The Respondent will pay this amount to the Claimant with interest @ 15% per annum from 2nd April 1998 to 11th October 2000 and thereafter @ 12% per annum from 12th October 2000 till the date of the Award i.e., 16th July 2004. Therefore, the Respondent is liable to pay to the Claimant an amount of Rs. 1,63,795 upto 11th October 2000 and Rs. 1,96,555 from 12th October 2000 to 16th July 2004.”

13. The learned Arbitrator also awarded costs of Rs.50,000 in favour of PTEA.

14. Mr. B.K. Satija, learned counsel for BHEL reiterated the submissions made before the learned Arbitrator. He submitted that Clause 3.3(viii) absolutely barred the payment of interest on any amount by BHEL to PTEA. It was submitted that once the money due was deposited by the BHEL in the Registry within the extended time granted by the High Court and it has been kept in a fixed deposit on which interest has been accruing, BHEL cannot be penalized with the extra financial burden of interest. He pointed out that the said money has been unavailable to BHEL. It was further submitted that it was PTEA which through several petitions had been delaying the resolution of the disputes. Therefore, BHEL should not be made to suffer for the delays caused by PTEA. There was no justification for the learned Arbitrator to allow interest at 15% and 12% per annum when in a number of cases the Supreme Court has awarded interest at only 9%. There was no mention in the MOM dated 3rd March 1998 that if payment was not made within 30 days it would carry interest. The MOM were misinterpreted by the learned Arbitrator. It was submitted that the learned Arbitrator also misconstrued the order dated 14th January 1999 of this Court.

15. Mr. Satija further submitted that the learned Arbitrator erred in holding that the individual items of recoveries were not legally permissible. As regards sales tax, a reference was made to the clauses of the MOM dated 3rd March 1998 which state that from the gross payable amount settled “applicable statutory recoveries for UPST and IT will be made”. Further, even in the order dated 14th January 1999 it was agreed that legal dues could be adjusted from other contracts. As regards insurance cover, it was submitted that PTEA had failed to produce any document to justify such insurance cover and, therefore, BHEL was justified in recovering the said amount. It was also submitted that the CVC was an independent body and its report was binding on the BHEL as well as PTEA. BHEL was obliged to make recoveries in terms of the recommendations of the CVC. Lastly, it was submitted that in directing the payment of interest on three sums i.e. Rs.14,05,714.36, Rs.5,75,000 and Rs.4,36,785.64, the learned Arbitrator exceeded his jurisdiction since the dispute referred to him concerned only the balance amount of Rs.4.38 lakhs.

16. Mr. Nikhil Nayyar, learned counsel appearing for PTEA, submitted that the impugned Award did not suffer from any error apparent on the face of the record. Relying on the decision in ***State of Rajasthan v. Ferro Concrete Construction Private Limited (2009) 12 SCC 1*** it was submitted that the scope of interference with the impugned Award was extremely limited. On the question of interest, he submitted that in light of the decision in ***Sayeed Ahmed and Company v. State of Uttar Pradesh (2009) 12 SCC 26***, which has been analysed by this Court in ***THDC India Limited v. Jaiprakash Associates Limited 2011 Indlaw Del 2631***, as long as there was no express bar to the award of interest, the learned Arbitrator could do so. Even if the learned Arbitrator reached a wrong conclusion or failed to appreciate some facts, it was not a ground for challenge. Reference was made to the decision

in *Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Private Limited (2010) 13 SCC 377*. Before the learned Arbitrator, PTEA led evidence to show that it was paying interest at 17.5% to its bank. Consequently, the award of interest by the learned Arbitrator at 12% and 15% did not call for interference.

17. The above submissions, and the written submissions filed by both parties, have been considered. The facts narrated reveal that despite their being a settlement between the parties arrived at on 3rd March 1998, as recorded in the MOM jointly signed by both parties, BHEL failed to make the payment in terms thereof and repeatedly sought time before the Court by filing applications. BHEL assured the Court on 19th November 1998 that it would make payment “positively within the first week of January 1999”. However, it did not do so and returned to the Court in January 1999 seeking extension. On 14th January 1999, two weeks’ extension was granted by the Court. BHEL was directed to bring the entire amount by way of a cheque on 1st February 1999. Thereafter on 1st February 1999, when BHEL brought a cheque for Rs.14,05,714.36, it was directed to deposit the balance amount of Rs.10,11,785.64 in the Registry within two days. The amount so deposited was asked to be kept in a fixed deposit for 45 days and kept renewed.

18. As correctly observed by the learned Arbitrator, there was a persistent default by the BHEL in making payments within the time as agreed by them in the settlement as well as the extended time granted by the Court. The order referring the disputes to the learned Arbitrator noticed the claim made by PTEA for interest and stated that “this is a matter that has to be decided by the Arbitrator”. The total amount payable under the settlement being Rs.25 lakhs, the question of non-payment of the said sum and any interest as

a result of delayed payment certainly formed the subject matter of the dispute before the learned Arbitrator.

19. This Court agrees with the finding of the learned Arbitrator that the amount of Rs.14,05,714.36 and Rs.5,75,000 were withheld without justifiable reasons and despite the Court granting time for making payment, BHEL kept filing applications for clarifications/ modifications. There is no merit in the contention of BHEL that the question of payment of interest on the above amounts was not the subject matter of the reference of the disputes to the learned Arbitrator.

20. In the circumstances of the case, the settlement dated 3rd March 1998 did constitute a novatio of the contract between the parties. The terms of settlement show that the parties intended to bring to an end all the disputes till that date. This is evident from Clause 6 of the settlement which states that “no further claims of either party will survive after this settlement/MOM agreement.” BHEL was to make payment as agreed within 30 days of the signing of the MOM.

21. Clause 3 of the MOM states that “from this gross payable amount settled, applicable statutory recoveries for UPST and IT will be made.” This refers to such statutory recoveries which may have had to be made after the date of the settlement and of which notice had been given by BHEL to PTEA. Consequently, the learned Arbitrator was right in concluding that there was no justification for BHEL to seek to recover various sums of money from PTEA more than seven months after the conclusion of the settlement dated 3rd March 1998.

22. The contention of BHEL that the report of the CVC justified the recovery of Rs.2,75,626.48 was rightly negated by the learned Arbitrator.

The report of the CVC was dated 15th November 1996 and this was prior to the settlement dated 3rd March 1998. Clearly, BHEL would have accounted for the said amount even while arriving at the said settlement. There was no justification for seeking to adjust the said sum after the settlement dated 3rd March 1998. The recovery towards photograph charges, testing charges and testing of cement and steel also were not justified after the settlement was entered into. Even as regards the recoveries and adjustment of Rs.1,11,627 towards insurance cover as no communication was sent to PTEA by BHEL stating that it had not received copies of the insurance policies, the claim was time barred and in any event no such recoveries could have been made after the settlement dated 3rd March 1998.

23. As regards recovery of Rs.40,000 towards sales tax, the learned Arbitrator has discussed the issue at great length in the light of Clauses 26.3 and 26.4 of the contract. On an interpretation of the said clauses and on an analysis of the evidence on record, the learned Arbitrator has given cogent reasons why the said recovery could not be made. The reasoning for this conclusion is contained in para 55 of the Award which reads as under:

55. Although the amount of Rs. 40,000, being adjusted and recovered towards sales tax is comparatively a small amount, considerable time and effort was spent in defending this. A written note dated 12th December 2003 was also filed. Admittedly, this is in respect of a contract for the construction of a primary school which was given in mid-1989 and completed in early-1990. The accounts in respect of that contract were settled in September 1991. There is nothing on record to show that any such amount was demanded by the sales tax department and/or that the said amount was paid by the Respondent to the Sales Tax Department in respect of the primary school contract. With the written note of 12th December 2003, Shri Satija has filed as Annexure 'F' dated 11th February 1991 to show the amount of sales tax deducted from the payments made to the Claimant. Annexure 'F' is a photocopy of a handwritten document which originated in the office of the

Respondent. Along with this document, there are two other typed sheets which are photocopies of documents dated 1st July 1991 and 15th July 1991. These have also originated in the office of the Respondent. These are internal documents and cannot be of any advantage to the Respondent because these do not show either that the demand was raised by the Sales Tax Department in respect of the primary school contract or that the Respondent paid the said demand to the said Department.”

24. In light of the law laid down in ***State of Rajasthan v. Ferro Concrete Construction Private Limited***, the above view of the learned Arbitrator was certainly a plausible one to take both on law as well as on facts.

25. Mr. Satija urged that the learned Arbitrator erred in referring to the earlier Award in respect of 72 flats as regards the payment of interest. This has been dealt with by the learned Arbitrator in para 73 of the Award. Indeed, there is nothing in the MOM which bars the payment of interest. Once, it was concluded that the settlement recorded in the MOM constituted a novatio of the contract, any resort to Clause 3.3(viii) of the contract by BHEL to deny payment of interest was misconceived. As rightly pointed out by learned counsel for PTEA, the learned Arbitrator was not bound by the contract between the parties which had effectively come to an end with the settlement dated 3rd March 1998. He had to look into the terms of the settlement to determine if there was any prohibition on payment of interest. If there was none, it was open to the learned Arbitrator to award interest even for the pre-reference and *pendente lite* periods. Given the fact that BHEL was made liable to make payment of the settlement amount within 30 days and it failed to do so, the claim by PTEA was indeed justified.

26. For the aforementioned reasons, this Court does not find any merit in any of the objections raised by the BHEL to the impugned Award under

Sections 30 and 33 of the 1940 Act. IA No.3802 of 2005 is, accordingly, dismissed.

27. The balance amount lying deposited in the Court together with interest accrued thereon will be paid by the Registry to PTEA through its authorized representative within a period of two weeks from today. As regards any further payment owing to PTEA in terms of the impugned Award, it would be open to PTEA to institute appropriate proceedings for recovery in accordance with law.

28. The impugned Award dated 16th July 2004 is made rule of the Court. The decree sheet be drawn up accordingly. Arbitration Petition No.206 of 2004 is disposed of in the above terms.

S. MURALIDHAR, J

AUGUST 6, 2012

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