

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 75/2006

Reserved on: 22nd March 2012

Decision on: 11th April 2012

PUNJAB NATIONAL BANK

..... Petitioner

Through: Mr. A.P.S. Ahluwalia, Senior Advocate
with Mr. S.S. Ahluwalia, Advocate.

Versus

M/S BIJLEE CONSTRUCTION

..... Respondent

Through: Mr. Joy Basu and
Mr. Sanjoy Bhaumik, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

11.04.2012

1. The Punjab National Bank ('PNB'), by this petition under Section 34 of the Arbitration and Conciliation Act 1996 ('Act'), challenges an Award dated 28th November 2005 passed by the sole Arbitration in the disputes between PNB and the Respondent M/s Bijlee Construction arising out of the award of the electrical work for the construction of RTC Building at Gomti Nagar, Lucknow (U.P.) by PNB in favour of the Respondent by a letter dated 10th February 1997.

2. Pursuant to the award of the above work, a formal contract was entered into between the parties on 3rd March 1997. The sole Arbitrator, to whom the disputes were referred for arbitration, passed the impugned Award dated 28th

November 2005 allowing the Respondent's Claim Nos.1, 2, 4, 5, 8 and partly allowing Claim No.17 relating to interest. The learned Arbitrator granted the Respondent simple interest at 12% per annum on the amounts awarded under Claim Nos.1, 5 & 8 from 1st January 2003 up to the date of the Award and post-award simple interest at 12% per annum from the date of the Award till the date of payment.

3. This Court has heard the submissions of Mr. A.P.S. Ahluwalia, learned Senior counsel for the Petitioner PNB, and Mr. Joy Basu, learned counsel for the Respondent.

4. The work was awarded to the Respondent by PNB's letter dated 10th February 1997 for the tendered amount of Rs.91,92,853.31. The scheduled date of start of the work was 24th February 1997 and the scheduled date of completion was 23rd May 1998. The actual date of completion was extended till 16th July 2001. Extension of time was granted by the PNB for the completion of the work up to 21st April 2001 without levy of compensation and up to 16th July 2001 with Rs.50,000/- as token Liquidated Damages ('LD').

5. Claim No.1 was for a sum of Rs.3,21,324/- being the amount due on account of recovering for the work of conduit pipes laid by civil contractor M/s M.G. Contractors, but illegally recovered from the Respondent. The

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case of the Respondent was that prior to the award of the electrical work, certain laying of conduit work was got executed by PNB through a civil contractor, M/s M.G. Contractors. When the Respondent reached the site, it found the said conduit work was improper. Despite several requests, PNB did not furnish the Respondent with the drawings showing the laying of the conduit pipes. Consequently, the Respondent had to chip and cut plaster at various places to clear the choked conduits and also to replace the damaged conduits. According to the Respondent, the route taken by the erstwhile civil contractor for laying the conduit pipes was longer. The details of the work done by the Respondent on the laying of the conduit pipes, was forwarded to the PNB even during the currency of the work. It was included in the final bill dated 22nd/24th December 2001.

6. The learned Arbitrator relied upon the evidence produced by the Respondent in the form of correspondence as well as the affidavit of Shri. Raj Kumar, who was not cross-examined by the counsel for PNB. The Arbitrator further found that neither the Respondent nor the PNB was aware of the poor quality of the work done by the previous contractor. Both of them were under a mistake of fact regarding the quality of work involved in the laying of conduit pipes by the previous contractor M/s M.G. Contractors. Consequently although PNB had made payment to the earlier civil contractor, the Respondent had a genuine case and therefore was entitled to seek reimbursement of the amount wrongly recovered from its bills by the

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PNB. The learned Arbitrator awarded the Respondent a sum of Rs.2,75,000/- in respect of the Claim No.1.

7. Referring to Clause Nos. 2.3 and 2.4 of the contract, it was submitted on behalf of PNB that the responsibility of getting acquainted of the site was that of the Respondent. No charges or claims based upon any lack of information, knowledge or understanding on the part of the Respondent would be entertained or payable by the PNB. Under Clause 2.4, it was open to the Respondent to seek clarification from the PNB. However, it did not do so. It is submitted that the finding of the learned Arbitrator that both PNB and the Respondent were under a mistake of fact was not based on any evidence and contrary to the terms of the agreement.

8. On behalf of the Respondent, it is submitted that the work executed by the earlier civil contractor was not visible to the naked eye during the inspection of site by the Respondent. The removal of the defective work and replacement of damaged conduit pipes by the Respondent was beyond the scope of the original work and was not included in the specification or the original drawing. Clause 5.31 which deals with the variation and deviation of work was referred to. Reference was also made to the correspondence between the parties which showed that the Respondent had sought permission of the PNB before proceeding with the extra work.

9. The learned Arbitrator has, in discussing the above claim, referred to the correspondence between the parties. He has also referred to Section 70 of the Contract Act, 1872.

10. The correspondence between the parties, in particular the letter dated 14th March 1998 (Ex. C-17), the letter dated 25th April 1998 (Ex. C-28), the letter dated 10th March 1998 (Ex. R-11), the letter dated 18th April 1998 (Ex. R-16) and the letter dated 5th November 1997 (Ex. R-4) do indicate that the work undertaken by the Respondent of the conduit pipes, that had been improperly done by the earlier contractor, was with the knowledge of PNB. There is merit in the contention of the Respondent, based on the decisions in ***State of U.P. v. Chandra Gupta & Co. AIR 1977 Allahabad 28*** and ***Sports Development Authority of Tamil Nadu v. Tarapore & Co. (2007) 1 R.A.J. 51 (Mad)***, that since the work done by the Respondent was to the benefit of PNB, the Respondent was required to be compensated under Section 70 of the Contract Act. The view taken by the learned Arbitrator was a plausible one based on the relevant clauses of the contract and the evidence in the form of correspondence between the parties. The Respondent also filed an affidavit by way of evidence but the deponent was not cross-examined by the PNB in the arbitral proceedings. The Court is unable to find any illegality in the learned Arbitrator awarding Rs.2,75,000/- in favour of the Respondent under Claim No.1.

11. Claim No.2 was for a sum of Rs.20,49,433/- towards loss of turnover/loss of profitability. Claim No.4 was for a sum of Rs.14 lakhs towards loss and damages on account of non-utilization/partial utilization of men.

12. The above claims of the Respondent were premised on the difficulty faced by it in the execution of the electrical work which resulted in delays that were not attributable to it. It is submitted that Clauses 5.12, 5.13.2 and 5.38 of the contract dealt with the extension of time with LD. This is in no way prevented the Respondent from claiming loss and damages. Reference was made to Sections 55 and 73 of the Contract Act and the decision of the Supreme Court in ***General Manager, Northern Railways v. Sarvesh Chopra (2002) 1 Arb. LR 506 (SC)***. Reliance was also placed on the decisions in ***Wee Aar Constructive Builders v. Delhi Development Authority (2001) 2 Arb. LR 71 (Delhi)*** and ***DDA v. Narain Das R. Israni (2008) 1 Arb. LR 58 (Delhi) (DB)***.

13. The learned Arbitrator held that the delay up to 21st April 2001 was attributable to the PNB. Even in its counter statement, PNB admitted the delay upto this period was not attributable to the Respondent. As far as the quantum was concerned, reference was made to the Certificate of Chartered Accountant, produced by the Respondent, which depicted the gross profit for the financial years 1991-92, 2000-2001. Applying the Hudson Formula, the

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learned Arbitrator awarded profit and overhead at 15%.

14. It was argued on behalf of the PNB that there is no justification for this claim particularly since escalation had already been awarded. It was submitted that once the Respondent had accepted the extension with LD unconditionally, it was estopped in law from claiming further damages. It was further submitted that under Clause 5.38, no claim of idle labour was to be entertained by the PNB under any circumstances. Under Clause 5.12 the tendered rates were inclusive of everything and nothing extra was to be allowed for incidental or contingent work, labour and/or materials. It is also pointed out that by the letters dated 13th October 1998, 8th May 1999 and 15th March 2001, it was made clear to the Respondent that extension of time was being granted only subject to price variation adjustment ('PVA') and no claim for damages would be entertained. This was accepted by the Respondent without protest and therefore it should be deemed to have waived any right to claim damages. Moreover, the Respondent failed to file documentary evidence as proof of the alleged loss suffered. It was accordingly submitted that the decision in this respect of the learned Arbitrator was not only contrary to the provisions of the contract but also beyond the scope of the submissions and materials placed on record.

15. The above submissions have been considered. There is a distinction to be drawn between the loss of profit which can be claimed by the contractor

and the right to claim escalation on account of price variation. The Hudson formula has been applied by the Supreme Court for awarding damages resulting from delays not attributable to the contractor. In para 15 of the decision in ***General Manager, Northern Railways v. Sarvesh Chopra*** the rationale was explained as under:

“15. In our country question of delay in performance of contract is governed by Section 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is “of the essence” of an obligation, Chitty on Contracts (Twenty-Eighth edition, 1999, at p. 1106, para 222-015) states “a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract (“a breach going to the root of the contract”) depriving the innocent party of the benefit of the contract (“damages for loss of the whole transaction”)”. If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party, i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed,

“unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so”. Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.”

16. The decision of the Division Bench of this Court in ***DDA v. Narain Das R. Israni*** is also to the same effect.

17. The Award of the learned Arbitrator is based purely on appreciation of the evidence on record. Applying the Hudson formula, the learned Arbitrator awarded only a part of the claim made which worked out to around 12.4% of the profit. This was a matter within the discretion of the learned Arbitrator. PNB has been unable to point out, if any, of the delay in the execution of the work was at all attributable to the Respondent. The clauses of the contract

cannot possibly foreclose a claim by the contractor for damages as a result of delay not attributable to the contractor. This was further explained by this Court in its order dated 2nd February 2009 in FAO (OS) No. 143 of 2006 titled **DDA v. P.C. Sharma & Co.** The view taken by the learned Arbitrator was a plausible one. The computation of the damages was also based on the audited accounts of the Respondent and cannot be said to be arbitrary. The Award in regard to Claim Nos. 2 & 4 is, therefore, upheld.

18. Claim No.5 was for a sum of Rs.53,000/- on account of charges paid to the civil contractor towards electricity and water consumption for the extended period of the contract. Again, reliance was placed by the PNB on Clause 5.12 to contend that no such claim was entertainable. The extension of time was granted by PNB and the delay could not be attributed to the Respondent. Further, the Respondent was able to produce evidence to prove the payment of the extra charges for water and electricity. In the circumstances, this claim was justified and, therefore, rightly allowed by the learned Arbitrator. The Award in respect of Claim No.5 is, therefore, upheld.

19. Claim No.8 was for a sum of Rs.87,238/- towards insurance charges during the extended period. Again, PNB relied on Clauses 5.12, 5.25 and 5.26 of the contract to contend that the tender rates were to be inclusive of everything necessary to complete the work and no extra was admissible.

20. As regards the above claim, once it was held by the learned Arbitrator that the delay up to 21st April 2001 was attributable to PNB, then the corresponding increase in the insurance charges for the extended period had to necessarily be borne by the PNB. There is no illegality in the learned Arbitrator allowing Claim No.8 to the extent of Rs.36,703/-.

21. The award of simple interest, under Claim No.17, at 12% per annum, cannot be said to be excessive or arbitrary.

22. For the aforementioned reasons, this Court finds no grounds having been made out by the Petitioner under Section 34 of the Act for interference with the impugned Award. The objections of the Petitioner PNB are hereby rejected. The petition is dismissed with costs of Rs.10,000/- which will be paid by the Petitioner PNB to the Respondent within a period of four weeks from today.

S. MURALIDHAR, J.

APRIL 11, 2012

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