

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 475 of 2007

Reserved on: February 13, 2012

Decision on: March 6, 2012

VIDESH SANCHAR NIGAM LIMITED

..... Petitioner

Through: Mr. Rishi Aggarwala, Advocate.

versus

M/S. V.K. AGGARWAL & CO.

..... Respondent

Through: Mr. Anil Seth, Advocate

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

06.03.2012

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by Videsh Sanchar Nigam Limited ('VSNL') is to an award dated 25th April 2007 passed by the sole Arbitrator in the disputes arising between VSNL and the Respondent, M/s. V.K. Aggarwal & Co. VSNL has challenged the impugned Award in respect of Claims Nos.1, 4, 6, 7, 8, 10, 11 and 13.

2. VSNL had called for a tender for the purpose of renovation of the external facia and other miscellaneous works at Videsh Sanchar Nigam Bhavan (VSN Bhavan) at New Delhi. The Respondent was the successful bidder. The bid made by the Respondent was for a sum of Rs.1,82,66,945.40. It was accepted by VSNL on 19th December 1997. A

Letter of Intent ('LOI') dated 15th March 1999 was issued by VSNL for the value of Rs.1,80,83,923.

3. In the LOI, it was agreed that mobilization advance would not bear interest only for a period of six months. In case the mobilization advance was not repaid within six months of its realization, the outstanding amount would be recovered after levying interest at the rate of 18%. The date for completion under the contract was 31st March 2000. Extensions were granted to the Respondent in terms of which the work was to be completed on 21st May 2000.

4. On 29th June 2000, the Architect appointed by VSNL informed it that the work had been completed on 31st May 2000. On 20th June 2000, the Respondent submitted its tenth running and final bill claiming a sum of Rs.18,95,638.67. Respondent also submitted its final account bill for the work for a total sum of Rs.55,20,689. On 4th October 2000, the Architect gave a certificate after taking measurement as per the tender quantity as recorded in the measurement books. After including deductions on account of mobilization advance, a sum of Rs.1,90,46,725.97 was certified to be paid to the Respondent. It is stated that after deducting the mobilization advance of Rs.18,08,400 the amount to be paid to the Respondent was Rs.1,72,38,725.97.

5. According to VSNL, the Respondent wrote to it on 22nd November and 8th December 2000 regarding the final bill but did not dispute the calculations made by the Architect or claim any extra amount or revision in rates. Even at a joint meeting held on 9th January 2001 no such claim was made. On 13th and 29th January 2001, the Respondent wrote to VSNL recording the agreement between the parties whereby the Respondent

would construct the security hut/guard room at the VSN Bhavan at New Delhi at the rates quoted in the tender for renovation of external facia and miscellaneous works. On 5th July 2001, VSNL requested the Respondent to provide certificates so that payment of the final bill could be made. VSNL states that on 1st October 2001 one Glaverbel issued a letter that GSC Toughened Glass Pvt. Ltd. had imported the glass for Petitioner's project and had been toughened by GSC Toughened Glass Pvt. Ltd. at their factory. It is stated that on 4th June 2002, the Respondent, for the first time, claimed exorbitant sums from VSNL. According to VSNL, these claims were barred by limitation.

6. Joint meetings were held between the parties on 25th June and 8th July 2002. However, the minutes of the meetings were not signed by the Respondent. According to VSNL, the tempering charges mentioned in the contract were Rs.1400 per sq. mtr. on the basis that the tempering of the glass would be done at the source of the manufacturing glass i.e. in a foreign country. Later, it transpired that tempering had, in fact, taken place at Noida in India after importing the glass with the charges being only Rs.558 per sq. m. Consequently, VSNL recovered a sum of Rs.6,48,786 from the final bill of the Respondent after giving the Respondent a notice. It is stated that on 29th July 2002, VSNL, after recovering Rs.6,48,786 for wrongful charge regarding tempering of glass, Rs.35,990 (for wrongful claim of the Respondent towards cement plaster), and Rs.14,000 (for hard workmanship) from the bill of the Respondent, made a balance payment of Rs.2,15,830. The Respondent contested this and invoked the arbitration clause. Later, the Respondent filed a petition under Section 11 of the Act before this Court which was disposed of by an order dated 25th November 2004 appointing the sole Arbitrator.

7. The Respondent filed fourteen items of claim before the learned Arbitrator. VSNL filed its reply to the above claims on 19th March 2005 and also raised two preliminary objections, i.e. that the claim of the Respondent was barred by limitation and that the letter of the Claimant (Respondent herein) invoking the arbitration dated 2nd August 2002 was not in terms of the arbitration clause since the mandatory prior consultation had not taken place between the parties.

8. As regards limitation, the learned Arbitrator held, that since payment of Rs.2,15,830 was made by VSNL to the Respondent on 29th July 2002 and the Arbitration clause was invoked on 2nd August 2002, the claims were barred by limitation. Further, the payment of Rs.2,15,830 was consequent upon negotiations held between the parties on 25th June and 8th July 2002. Thus, Clause 37 of the contract was complied with by the Respondent. The second preliminary objection was also, therefore, rejected. The decision of the learned Arbitrator as regards the preliminary objections of VSNL does not call for interference.

9. Claim No.1 was for a sum of Rs.7,53,330 on account of balance payment due as per final bill certified by the Architect and adjusting all payments made by the Respondent. Later this claim was restricted by the Respondents to Rs. 4,87, 534. The learned Arbitrator referred to Clause 24 of the contract in terms of which payment had to be made as per the certificate of the Architect. Here the amount certified by the Architect as payable to the Respondent was Rs.1,90,46,725 whereas VSNL had unilaterally reduced it to Rs.1,89,82,286 and thereafter paid a sum of Rs.2,15,830 in full and final settlement. Accordingly the learned Arbitrator held that the Respondent was entitled to the difference in the sum of Rs. 64,439. Apart from VSNL simply stating that it had deducted

a sum of Rs. 6,98,776 from the amount certified by the Architect “in view of the Respondent having breached the terms of the contract”, the VSNL was unable to show the learned Arbitrator, or for that matter even the Court, how the Respondent was in breach of the contract. The finding of the learned Arbitrator that the final certificate of the Architect, unless shown to have been obtained by fraud, ought to be honoured by VSNL is based on correct understanding of the relevant clauses. Further the learned Arbitrator pointed out that the minutes dated 25th June and 8th July 2002 relied upon by VSNL to urge that all dues had been settled were not signed by any one. Therefore it could not be said that the Respondent had waived its right to recover the differential sums under Claim No.1. This part of the impugned Award cannot be held to be illegal as contended by VSNL.

10. Claim No.11 was for a sum of Rs. 15,86,738 which according to the Respondent was withheld illegally by VSNL on no valid grounds. The learned Arbitrator has awarded the Respondent Rs.8,46,361 as against this claim. According to VSNL, it had rightly deducted Rs. 6,48,786 since the Respondent could have charged Rs.1400 per sq.m only where the toughening of the glass had taken place at the source of manufacture, whereas in the present case, the toughening of the glass took place at Noida. The Arbitrator referred to Clause 14 of the contract which required the toughening of the glass to be carried out by the original manufacturer of the glass to bring it up to international standards. According to the Arbitrator, this did not require that the toughening of the glass had to be done at the source of the import.

11. Mr. Rishi Aggarwala, learned counsel for the Petitioner, reiterated the submissions made before the learned Arbitrator that no notice was

required to be issued to the Respondent for deduction from the RA bills. He submitted that the Respondent was illegally claiming Rs.1400 per sq. m. for tempering of the toughened glass when GSC Toughened Glass Private Limited had itself confirmed that only Rs.558 per sq. m. was being charged for toughening of the glass. In reply, it was submitted by Mr. Anil Seth, learned counsel for the Respondent He points out that the letter dated 4th August 2002 of GSC Toughened Glass Private Limited is not a certificate and is only an offer by the vendor to VSNL two years after the completion of the work. He points out that under BOQ item No.7.04, what is required is that the glass should be fully tempered “at the source of manufacture.” Further, Clause 16(3) of the Specification provides that “the contractor shall cut glass sizes by field measurement or dimensionally approved drawings.” Consequently, the toughening of the glass had to take place after cutting by the contractor since toughened glass could not be cut to sizes and tempered.

12. A perusal of the impugned Award shows that the learned Arbitrator has considered the above submissions at length. He has exhaustively analysed the relevant clauses of the contract. It is plausible to interpret the relevant BOQ as requiring tempering to take place only after the toughened glass is cut. Clause 16(3) of the Technical Specifications was also required to be complied with. The agency at Noida which tempered the glass was an agent of the manufacturer of the glass. The Architect accepted the quality of the tempering toughened glass as meeting the required specifications. That was what was really important and not so much the place at which it was to be tempered. As regards the rates charged for the tempering, this is a pure question of fact. As pointed out by learned counsel for the Respondent, the letter dated 4th August 2002 is indeed not a certificate issued by GSC Toughened Glass Private Limited.

It is also two years after the completion of the work by the Respondent. This again was a matter of appreciation of evidence and the view taken by the Arbitrator was a plausible one.

13. Claim No.4 was on account of extra work that was not part of the contract. Mr. Aggarwala referred to Clause 16 of the contract which provided that “the rates quoted in the tender shall include all charges for doubles scaffoldings, centering materials water and meter charges, electric charges, temporary plumbing, cost of cisterns; hire for any tools and plants , sheds for materials, marking out and clearing of site, watering concrete as mentioned in the specifications” He, accordingly, submitted that the claim of the Respondent for a sum of Rs.16,78,025 being an extra was, in fact, a part of the scope of work and, therefore, not admissible. It was submitted that the learned Arbitrator erred in awarding the Respondent Rs.5,78,550 for providing shuttering and additional thickness of plaster. Further, under Clause 21 there was a bar on the learned Arbitrator awarding the Respondent any compensation for loss suffered on account of delays in commencing or executing the work whatever the costs of delay may be. Mr. Seth, on the other hand, submitted that it was clear from the hindrance register duly signed by the Architect that the work was on hold for ninety-three days and that VSNL had not taken a decision regarding waterproofing work. Further, on account of the delay caused by VSNL, the scaffoldings erected by the Respondent for the external finishing lay idle and this delay was unforeseen and unprecedented. It is submitted that the delay of over three months could not have been anticipated at the time of bidding for the work.

14. A perusal of the arbitral record shows that by letter dated 30th August 1999 the Respondent notified M/s Kothari Associates Pvt. Ltd. of the

delay in the work resulting in losses being suffered by the Respondent and reserving the right to raise a claim in that regard. By letters dated 27th March 2000 and 25th April 2000 addressed to VSNL, the Respondent again requested VSNL to expedite its decisions failing which it would be “forced to claim extra amount for our overhead and expenses.” Clause 21 of the contract, as pointed out by the learned counsel for the Respondent, does not envisage a three month delay as barring the Respondent to any additional cost. These were indeed situations for which the Respondent could not be saddled with the losses. The learned Arbitrator cannot be held to have decided the said claim contrary to the terms of the contract. Of the sub-claim under claim No.4, only sub-claim No.2 to the extent of Rs.5,78,550 for the scaffolding remaining idle for a period of 93 days has been awarded. It cannot be held that the award in respect of Claim No.4 is contrary to law or to the terms of the contract.

15. Claim No. 6 was on account of excess quantity executed beyond contractual limits. Relying on the decision in the ***State of Orissa v. Sudhakar Das (Dead) By LRs, (2000) 3 SCC 27***, Mr. Aggarwala submitted that the Agreement clearly bars any escalation being paid to the Respondent. Consequently, the award of a sum of Rs. 3 lakhs as against the claim of Rs.6,31,049 was contrary to law as well as the express terms of the contract. Moreover, the Respondent itself had sought extension of time by a further period of six months. At the time of seeking such extension, the Respondent did not ask for any extra amount or revision of the rates. VSNL had, in its letter dated 29th January 2001, while allowing Respondent to commence the construction work of security huts, categorically stated that the work would be executed on the rates, terms and conditions quoted in the tender. It was submitted that the Arbitrator erred in allowing the said claim. On the other hand, Mr. Seth relied on the

decision of the Hon'ble Supreme Court in ***Harcharan Singh v. Union of India, (1990) 2 ALR 243*** and pointed out that under Clause 2, it was provided that if the compliance with the Architect's instructions and/or any Government notification involves work or expense beyond that completed by the contract, the employer shall pay the contractor the price of the said work as an extra to be valued and/or expenses and/or loss.

16. The reasons given by the learned Arbitrator in allowing claim No.6 cannot be stated to be perverse. The learned Arbitrator has gone by the wholesale price index circulated by the Ministry of Industry which showed wholesale price index variation at 14%. It cannot, therefore, be said that the impugned award as regards claim No. 6 has been wrongly decided.

17. Claim No.7 was for Rs.3,71,928 on account of deduction of works contract tax. It is pointed out by Mr. Seth that while the employer is under obligation to deduct TDS as per the Delhi Works Contract Tax Act from the payment released to the Respondent, the levy of work contract tax is an additional cost which was not envisaged at the time of submission of the bid. In fact, as pointed out by the learned Arbitrator, Clauses 17 and 18 of the Special Conditions of Contract mandatorily require the contractor to observe all formalities in relation to the Contract Labour (Regulatory and Abolition) Act. The reimbursement of the increased wages as a result of thereof was to be reimbursed to the contract. The decision in this regard by the learned Arbitrator cannot be said to be contrary to law.

18. Claim No.8 was for a sum of Rs.14,68,318 on account of expenses incurred due to statutory increase in wages of labour but not paid by

VSNL. Again reliance was placed on Clause 16 to contend that all the labour rates and taxes are included in the price. Further, it is stated that the Respondent did not ask for an increase in the wages in its tenth and last bill dated 20th June 2000. The learned Arbitrator has noted that the contractor, having to comply with the requirements of the contract labour legislations, could not deny the reimbursement of increase in statutory wages. Further, as pointed out by learned counsel for the Respondent, Supreme Court has, in ***Food Corporation of India v. A.M. Ahmed, (2006) 4 ALR 155***, observed that escalation by way of statutory wage revision has to be accepted when there was delay in execution of the contract and was permissible to be awarded by an arbitrator. Consequently, on this score also this Court does not find any illegality having been committed by the learned Arbitrator.

19. Claim No.10 was for a sum of Rs.1,21,034 on account of wrongful deduction towards interest charge on mobilization advance. The learned Arbitrator held that there being delay on the part of VSNL in the release of payments of the RA Bills, the Respondent had to necessarily furnish a bank guarantee for receiving the mobilization advance and in all fairness VSNL should not charge interest on the said sum. The view taken by the sole Arbitrator is a plausible one in the facts and circumstances of the case. As regards cost of arbitration, in Claim No. 13, it had necessarily to follow the decision in each of the claims.

20. Mr. Aggarwala relied upon the decision in ***Rashtriya Chemicals and Fertilizers Limited v. Chowgule Brothers, 2010 (8) SCC 563*** to urge that the learned Arbitrator could not have travelled beyond the terms of the contract. Reliance was also placed on the decisions in ***ONGC v. Wig Brothers Builders and Engineers Private Limited, 2010 (13) SCC 377***

and ***Rajasthan State Mines & Minerals Limited v. Eastern Engineering Enterprise, 1999(9) SCC 283.*** As far as the law explained in the above decisions is concerned, it is well settled that that the Court does not examine the Award as an appellate court and will not re-appreciate the evidence only to come to a different conclusion. Interference is called for only where there is “an error on the face of the award or if there is misconduct on the part of the Arbitrator or legal misconduct in conducting the proceedings in making the award.” None of these factors are found present in the instant case.

21. For the aforementioned reasons, this Court finds no ground to interfere with the impugned Award. The petition is dismissed with a cost of Rs.20,000 which shall be paid by the Petitioner to the Respondent within four weeks.

S. MURALIDHAR, J.

MARCH 6, 2012
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