

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

% Date of decision: 27.08.2012

+ FAO (OS) No.408 of 2012

P. BANERJEE APPELLANT
Through: Mr. Amit George, Adv.

Versus

BHARAT HEAVY ELECTRICALS LIMITED RESPONDENT
Through:

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J. (Oral)

CM No.14725/2012 (Exemption)

Allowed subject to just exceptions.

FAO (OS) No.408/2012

1. Mr. P. Banerjee as the Sole Proprietor of M/s. Pee Tee Engineering Associates submitted a bid in pursuance of a tender floated by the respondent-Bharat Heavy Electricals Limited (for short 'BHEL') for the work of construction of additional 250 flats at BHEL Colony, Sector-17, Noida on 7.6.1989. In terms of the requirement of the tender the bid was submitted under the cover of a letter of the even date. This letter at the inception stated that:

 "...notwithstanding the terms of specifications and special conditions of clauses, the contents of this letter also will form an integral part of the tender."
2. The letter also incorporated various aspects emanating from

different clauses of the notice in that tender and the relevant clause for the present dispute as set out in the letter is as under:

“Clause –XI General: - Prices quoted by us in the tender are based on the rates prevailing Market rate as on 7.6.89. Any statutory increase in Labour and materials (Except materials supplied by the department) during the execution period, the department shall be compensated to us the cost, considering the Govt. notification of Price Index for all commodities.”

3. It is the say of the appellant that a Letter of Intent was thereafter issued on 5.1.1990 through a telex message which began by referring to the offer of the appellant dated 7th June, 20th June and 12th August, 1989 and subsequent MOMs dated 21st November and 28th November, 1989 calling upon the appellant to execute the agreement on the prescribed performa within ten (10) days from the date of the Letter of Intent. It is thereafter that an agreement dated 8.1.1990 was executed *inter se* the parties. This agreement specifically stated in the recital that the documents set out thereunder were deemed to form, and be read and construed as, part of the Agreement and at serial No.(h) thereof it was mentioned as under:

“h) The letter of acceptance of any other correspondence and documents mentioned therein to form part of the agreement.”

4. The agreement also contained an arbitration clause 43 for settlement of disputes through arbitration, the arbitrator to be appointed by the General Manager of the respondent.
5. The disputes arose between the parties and the appellant invoked the arbitration clause but the two arbitrators appointed

consecutively by the General Manager, BHEL were unable to continue in that capacity and, thus, resulting in the appellant filing an application under Section 20 of the Arbitration Act, 1940 (hereinafter referred to as the 'said Act'). This application was allowed by an order dated 26.10.1999 by the learned single Judge of this Court appointing Mr. M.L. Verma as the arbitrator. The arbitrator made and published the award dated 11.2.2011 of more than 70 pages dealing with the various claims. The appellant was allowed a sum of ₹9,93,220.00 under the award and only future interest @ 9 per cent per annum from the date of award till date of payment in the eventuality of the failure of the respondent to pay the amount within one (1) month from the date of the award was granted.

6. The appellant, aggrieved by the non-grant of various claims filed objections under Sections 30 & 33 of the said Act after the award was filed in the Court, which have been dismissed by the impugned order dated 4.7.2012 assailed in the present appeal.
7. We may notice at the threshold that before the learned arbitrator the issue arose as to whether the proceedings would continue under the said Act or under the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the '1996 Act'). The appellant pleaded that it is the 1996 Act, which would apply while the respondent pleaded that it is the 1940 Act, which would apply. The learned arbitrator accepted the contention of the appellant in view of the then prevalent legal position as per the pronouncement of the Supreme Court in Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd. (1999) 9 SCC 334 and held that the arbitral

proceedings would be governed by the 1996 Act. However, in view of the subsequent pronouncement by the Supreme Court in Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd. AIR 2004 SC 3145 the position emerged to the contrary and, thus, the learned single Judge in the impugned order has opined that it is the said Act which would apply and, thus, the objections have been correctly filed under Sections 30 & 33 of the said Act. This issue has not been further raised before us in the present appeal.

8. The two aspects which have been urged by learned counsel for the appellant are as under:

- i. The rejection of the claim of the appellant for escalation of prices.
- ii. Rejection of claim Nos.4 & 7 towards withheld amount and compensation and losses suffered on account of the breaches of contract by the respondent respectively.

9. Insofar as claim Nos.4 & 7 are concerned, they have been dealt with in para 140 of the award as under:

“140. Before proceeding further, it may be noted that Claim No.7 for ₹5,00,000/- is for compensation and losses supposed to have been suffered by the Claimant for the breaches of the contract alleged to have been committed by the Respondent. No material was placed on record in support of this claim. In fact, on 6.9.2005, Mr. Chandwani made a statement on behalf of the Claimant and in the presence of the Claimant, that regarding Claim No.7 he had nothing more to add except what was stated in the written submissions filed on 16.12.2004. He did not advance any oral arguments in support of this Claim. The written submissions regarding Claim No.7 are cryptic and do not mention the breaches supposed to have been committed by the Respondent and how the Claimant suffered losses. No

details of such losses have been mentioned and nothing has been stated regarding mitigation of losses and damages. Therefore, this claim is dismissed. Also, Claim No.4 for ₹52,000/- is rejected as the Claimant could not substantiate this Claim and the Respondent was able to demonstrate that this amount was not withheld but was actually paid. Claim No.4 is without any merit and is rejected. Therefore, the claim of interest on this amount also goes. In any case, as already held, the Claimant is not entitled to any interest in view of the specific bar.”

10. There is no further reasoning added by the learned single Judge. A reading of the award, thus, shows absence of material placed on record by the appellant-claimant. The arbitrator noted that the counsel for the appellant had confined himself to written submission filed on 16.12.2004 which could not establish how losses of ₹5.00 lakh as claimed were suffered. Similarly in claim No.4 for ₹52,000 for withheld amount was not awarded as the finding is in favour of the respondent that this amount was actually paid and not withheld. The stand of the respondent has been accepted as set out in para 38 which reads as under:

“38. According to the Respondent, Claim No.4 for ₹52,000/- towards the amount withheld by the Respondent from 9th, 10th and 11th Running Account Bills is misconceived, untenable and without any basis. It is denied that any such amount had been withheld. It is pointed that the amount deducted from different running bills was paid subsequently as follows:

<u>Running Account Bills</u>	<u>Amount withheld (-)/release (+)</u>
9 th R/A bill Pg.39, MB04/C :	(-) ₹10,000.00
10 th R/A bill Pg.73, MB04/C :	(-) ₹12,000.00
11 th R/A bill Pg.110, MB04/C :	(-) ₹50,000.00
12 th R/A bill Pg.138, MB04/C :	(+) ₹40,000.00
13 th R/A bill Pg.167, MB04/C :	(-) ₹10,000.00

Final bill Pg.19, MB04/C : (+) ₹42,000.00
Balance NIL”

11. Learned counsel for the appellant did seek to contend that the withheld amount under claim No.4 was akin to claim Nos.1, 5 & 9 and those claims have not been dealt with. We, however, find that claim Nos.1, 5 & 9 have been dealt with in the award in paras 144 & 145 as under:

“144. Coming now to Claims 1, 5 and 9, I am of the considered opinion that the matter was unnecessarily confused which consumed too many dates of hearing. It is an admitted position that the value of total work done by the Claimant was ₹1,85,00,000/- as is evident from Annexure C-11 which is a certificate dated 15.1.1992 signed by one Shri V.C. Ramullu, Senior Manager (A & C) of the Respondent. This is an admitted document. It was feebly suggested by Mr. Satija that the value of the work done cannot be more than ₹1,83,95,000/-. However, he did not dispute that the value of actual work done was ₹1,85,00,000/-. As against this, it is now clear that the gross amount paid by the Respondent to the Claimant is ₹1,76,47,913.97P. This fact is also not in dispute. Consequently, the Claimant is entitled to ₹8,52,086.03 towards the value of the work done and not paid. This covers Claims 1, 5 and 9 which are in respect of extra mosaic flooring, unlawful deduction and value of work done but not paid.

145. The Claimant could not satisfactorily explain why the Claimant was charging ₹174/- per sq.ft. for the extra mosaic flooring although it referred to some observations in the report of the General Managers of the Respondent. But it is not necessary to go into the question in the view that the Tribunal has taken with regard to the value of the total work done and the gross amount received by the Claimant from the Respondent. The position is the same with regard to Claim No.5. In this view of the matter, there is no need to go to the separate and individual items under 50 different

heads claimed under Claims 5 and 9. It bears repetition that there is no need to do so in the view the Tribunal has taken pertaining to the total value of work done by the Claimant and the gross amount of payment received by the Claimant from the Respondent.”

12. It appears that claims 1, 5 & 9 have not been urged before the learned single Judge. If they had been urged then a discussion would have been made qua those claims and it is, thus, not permissible, in any case, for learned counsel for the appellant to rake up this issue, not having urged this aspect before the learned single Judge. In any case paras 144 & 145 show that the decision on claims 1, 5 & 9 is based on appreciation of evidence and it is certainly not the function of this Court to re-appreciate the evidence.
13. The real dispute is the first one which arises from the submission of the learned counsel for the appellant that while submitting its bid under the cover of letter dated 7.6.1989, the appellant had clearly stated that the prices quoted were based on the rates prevailing in the market as on 7.6.1989 and, thus, any statutory increase in labour and material prices during the execution period would have to be compensated to the appellant. Learned counsel for the appellant submitted that the LoI sent through telex also referred to this letter and the agreement ultimately executed *inter se* the parties on 8.1.1990 specifically stated in the recital that the documents referred to therein would be deemed to form and be read as part of the agreement which included “the letter of acceptance or any other correspondence or documents mentioned therein to form part of the agreement” (it was agreed before the

arbitrator that the word “of” should read as “or”).

14. Learned counsel also submits that the relevant notifications qua the increase in rates were submitted along with the written submissions filed by learned counsel for the appellant on 3.10.2005 as is apparent from Annexure A-5, which is the index to the written submissions and, encloses as Annexure ‘C’, the rates. Learned counsel has also sought to rely on Annexure A-7, which was a recommendation of the GM’s Committee regarding the amicable settlement between the two parties of the dispute in question. The Minutes dated 18.8.1999 recorded that payments towards labour and material escalations (other than the cement and steel) was tenable, subject to the appellant furnishing the proof of payments made at the escalated rates.
15. It is the submission of the learned counsel for the appellant that the aforesaid would, thus, show the validity of the claim made by the appellant and the fact that the relevant notifications for rates were filed only with the written submissions should not prejudice the appellant as the proceedings of the arbitrator dated 9.11.2005 record that learned counsel for the appellant had filed the written note with regard to claim No.10 during the proceedings on 3.10.2005 and made his submissions by reference to the said note.
16. A discussion in the award qua the said claim No.10 as contained in para 142 & 143 reads as under:

“142. Before dealing with Claims 1, 5 and 9, it may also be appropriate to consider Claim No.10 which is in the sum of ₹26,57,833.85P for ‘escalation’. The Claimant relied upon correspondence which, according to the Claimant, is part of the Agreement under which, according to the Claimant, the

Respondent is liable to pay for escalation. The correspondence on which the Claimant has relied speak about the escalation being paid in the event of “any increase in labour and materials”. However, the Claimant has not placed any material on record to substantiate this claim. It has referred to another contract between the same parties in respect of ‘HRDI’ but has failed to show the basis for making this claim which is of a large amount in comparative terms. The contract was executed within the period stipulated i.e. 15 months. Nothing has been brought on record to establish that during this period the cost of material and/or the wages of labour had increased.

143. In spite of opportunity provided to the Claimant, more than once, to produce the material in support of the claim, he failed to do so. The Claimant has not placed any Notification of the Government regarding price index to show that prices of any material used in executing the contract had increased during the period when the contract was executed. In any case, Clause 25 of the General Terms and Conditions governing the contract bars any amount being paid towards escalation. I, therefore, hold that Claim No.10 for escalation cannot be allowed and hence it is rejected. In this view of the matter, it is not necessary to decide whether the claim for escalation is barred by time or not.”

17. The aforesaid conclusion has found favour with the learned single Judge also.
18. The plea is, thus, really two fold – firstly that the material was on record; and secondly that the escalation was liable to be paid. It is obvious that so far as the material being on record is concerned, the appellant failed to produce the relevant material with their evidence and prove the same in accordance with law. It is sought to be inserted along with the written submissions in an oblique manner, which was not permissible. This was apart from the fact

that the appellant failed to prove that the amount had actually been spent which was the basis for the GM's committee noting which incidentally was towards a proposal for settlement, which never matured.

19. As far as the entitlement of the claim is concerned, no doubt the appellant had stated that it wanted the statutory increase in labour and material rates to apply in its letter of offer dated 6.8.1989. There was exchange of correspondence *inter se* the parties. This correspondence was to form a part of the agreement, however, the final agreement dated 8.1.1990 contained clause 25 of the general terms & conditions which clearly prohibited any claim for escalation. If clause 25 was not to apply then it had to be scored off and the communication also did not show there was any express agreement to override clause 25. The reliance placed by learned counsel for the appellant on the judgement of the Supreme Court in G. Ramachandra Reddy & Co. Vs. Union of India & Anr. AIR 2009 SC 2629, is of no avail as in that case the correspondence *inter se* the parties was unambiguous and explicit to replace clause 25 while it is completely to the contrary in the present case. The said clause is reproduced as under:

“The individual items rates or lump sum prices, as the case may be, in the Schedule of this contract shall be deemed to be firm for the entire period of the contract or extended period of the contract and no escalation in the rates or prices shall be permissible for any reason whatsoever. The contract price shall not be varied in case of fluctuation in rate of wages or allowance payable to the labour or in the cost of materials, consumables, water, fuel, power or freight rates or for the soil conditions subsequently discovered at site.”

20. The second judgement relied upon by learned counsel for the appellant is in Food Corporation of India & Anr. Vs. Ram Kesh Yadav & Anr. AIR 2007 SC 1421, more specifically paras 10 & 11. The dispute related to an employee seeking voluntary retirement on the basis of compassionate appointment of his dependent. It is in that context, it was observed as under:

“10. When an offer is conditional, the offeree has the choice of either accepting the conditional offer, or rejecting the conditional offer, or making a counter offer. But what the offeree cannot do, when an offer is conditional, is to accept a part of the offer which results in performance by the offeror and then reject the condition subject to which the offer is made.

11. In the context of second Respondent's conditional offer of voluntary retirement contained in the letter dated 26.4.1999, FCI had, therefore, the following options:

(a) Reject the request for voluntary retirement on the ground that a conditional offer was contrary to the Scheme and it was not willing to consider any conditional offer.

(b) Reject the request for compassionate appointment on the ground that the employee was more than 55 years of age or on the ground that it was not a deserving case or because there was no vacancy, and then refer the employee to a Medical Board for compulsory retirement on medical grounds.

(c) Require the employee to make separate applications for voluntary retirement on medical grounds and for compassionate appointment strictly as per rules and the scheme.

(d) Accept the request of the employee for voluntary retirement on medical grounds subject to the condition

stipulated by the employee and provide appointment to his son on compassionate grounds;

When FCI accepted the offer unconditionally and retired the second respondent from service by office order dated 29.7.2000, it was implied that it accepted the conditional offer in entirety, that is the offer made (voluntary retirement) as also the condition subject to which the offer was made (appointment of his dependant son on compassionate grounds). In his application, the second respondent made it clear that he desired to retire voluntarily on medical grounds only if his son (first respondent herein) was provided with employment. If FCI felt that such a conditional application was contrary to the Scheme or not warranted, it ought to have rejected the application. Alternatively, it ought have informed the employee that the compassionate appointment could not be given to his son because he (the employee) had already completed 55 years of age and that it will consider his request for retirement on medical grounds delinking the said issue of retirement, from the request for compassionate appointment. In that event, the employee would have had the option to withdraw his offer itself. Having denied him the opportunity to withdraw the offer, and having retired him by accepting the conditional offer, FCI cannot refuse to comply with the condition subject to which the offer was made.”

21. There can be no dispute about the legal principles qua the conditional offer but in the present case, the communications ultimately merged into the contract dated 8.1.1990, which in turn incorporated clause 25 as a specific term, which would be binding on the parties. It is this term which would, thus, govern the parties.
22. Claim No.10, thus, made by the appellant was in the teeth of this clause 25.0 “Prices” of the general terms & conditions which held fort and was not superseded by any communication. In any case,

this is certainly a plausible interpretation, if not the only interpretation, and the view of the arbitrator must prevail.

23. The aforesaid being the only aspects urged, we find no merit in the appeal, which is dismissed.

SANJAY KISHAN KAUL, J.

AUGUST 27, 2012
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VIPIN SANGHI, J.