

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

% *Judgment reserved on : 9th May, 2013*
Judgment pronounced on: 31st May, 2013

+ **OMP No.887/2012**

DELHI JAL BOARD & ORS Petitioners
Through Mr.L.K. Singh, Adv.

versus

M/S KHUB CHAND TYAGI Respondent
Through Mr.Vivekanand, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') against the Award dated 14th May, 2012 passed by the learned sole Arbitrator appointed by learned Additional District Judge in Suit No.469/2004, whereby the learned Arbitrator has allowed all the claims of the respondent.

2. Claim Nos.1 and 4 had been admitted by the petitioner before the learned Arbitrator and thus the Award of claim Nos.2, 3, 5, 6 and 7 has been challenged by the petitioner.

3. The brief facts are :

i) The petitioner herein (erstwhile Delhi Water Supply and Sewage Disposal undertaking now reconstituted and taken over by Delhi Jal Board) had awarded the work named and styled as "Construction of

underground Reservoir and Booster Pumping Station at Holumbi Kalaun, vide letter No.F.3(369/EE(W)C-1/447 dated 20th August, 1993.

- ii) The work order was issued on 27th December, 1993. It was however, clarified vide letter of intent dated 20th August, 1993 that the date of start of the work shall be reckoned from 30th day of issuance of letter of intent. Pursuant to this the respondent had started the work on 20th October, 1993 itself. Therefore, the date of completion of the work had to be 20th July, 1995 i.e. within a duration of 22 months.
- iii) The date of actual commencement of work was 20th October, 1993.
- iv) The total value of the work was Rs.1,69,40,757,38/-.
- v) In pursuance of the said letter of intent dated 20th August, 1993, the respondent herein had commenced the work on the site, which had been recorded in the measurement book prepared in the due course of business, recording the measurement of the quantities executed by the respondent herein.

4. It is alleged that the petitioner herein provided a fresh set of drawings to the respondent in the month of October, 1993 on the basis of which the excavation work was started by the respondent. The benefit of the period consumed in changing the layout plan of the work in question was given to the respondent herein by way of *pro rata* extension and payment as per escalations and as per the agreed terms (Clause 46 of GCC), the respondent herein was required to furnish a Bar Chart, covering all major activities, to the Engineer-in-charge within 10 days from the date of award of the work, so that the petitioner herein could be in a position to visualize the need of the stipulated materials of different specifications for executing the work by the

respondent herein.

5. It is also submitted by the petitioner that as on 12th December, 1995, the Engineer in charge of the work had inspected the site and noticed that the respondent herein had completed the work to the extent of 95% in the first phase of the construction. However, there were some balance items to be executed by the respondent for which the inventory was prepared on 12th December, 1995 itself and the same was communicated to the respondent by letter dated 12th December, 1995. The work site was again inspected in the company of representatives of the respondent herein on 6th February, 1996 by the Engineer-in-charge and it was found that the aforesaid work still remained unexecuted. An inventory of the unexecuted work was prepared and communicated to the respondent herein vide letter dated 14th February, 1996 and as per the Clause 2 of the Conditions of Contract, the petitioner herein levied liquidated damages to the tune of ₹20,000/-, which was communicated to the respondent herein in the year 1996 and reminded again on 29th December, 1998.

As per Clause No.4.1 of the Special Conditions of Contract “SCC”, the respondent herein had to arrange electricity connection from the respective department (erstwhile D.E.S.U.) on recommendations made by the petitioner herein. All expenses including energy consumption charges had to be borne by respondent herein and nothing was payable to the respondent herein in this regard.

6. It was the case of the petitioner before learned Arbitrator that due to callous attitude of the respondent, a bill amounting to ₹58,469.66/- from DESU, as also informing disconnection was received informing that the aforesaid amount was lying due to the respondent who failed in completing

all the works in terms of the contract and leaving certain items unexecuted, the petitioner herein was constrained to engage services of another contractor for completion of the work costing the petitioner ₹2931/- which was pointed out to the respondent herein vide letter dated 29th January, 1999 by the then Executive Engineer as also explaining levy of ₹20,000/- penalty under Clause 2 of the Conditions of Contract.

7. It was alleged by the petitioner that the respondent despite several communications from the petitioner failed to accomplish/complete all the tasks as per the agreed terms. The petitioner thus levied penalty on the respondent. The respondent agitated with the petitioner to withdraw the letter dated 29th December, 1998 levying penalty for delay/non-completion of work.

8. It is alleged by the petitioner that the learned Arbitrator by his Award dated 14th May, 2012, has incorrectly directed to pay to the respondent a sum of ₹6,00,067/- (Claims 1 and 2 viz on account of work done but not paid including withheld amount), ₹4,48,642/- (Claim 3 on account of escalation/increase rates as per Clause 10CC of the Conditions of Contract “CC”), ₹1,00,000/- (Claim 4 on account of refund of security deposit), ₹13,53,200/- (Claim 5 on account of losses suffered due to prolongation), interest on the aforesaid amounts at 12% p.a. simple interest during the period of this arbitration (in respect of Claim No.6 for interest) and ₹ 1,77,000/- (in respect of Claim No.7 on account of arbitrator’s fees and expenses etc.) to be paid within 3 months from the date of Award.

Apart from that the learned Arbitrator has also directed that the aforesaid amounts have to be paid within three months of date of the Award, failing which an interest of 12% simple interest per annum will also be

payable to the respondent from the date of award till the actual date of payment.

9. The Award was challenged by the petitioner mainly on the ground that the learned Arbitrator overlooking and going beyond the agreed terms and the relevant documents in a patently misconceived manner passed the erroneous Award allowing all the claims of the respondent on as it is basis, thereby prejudicing the *bona fide* interests of the petitioner which has been passed against the specific provisions of Contract entered into between the parties and the applicable substantive and procedural law. The Award is bad in law as it is patently illegal and is violative of the principles of natural justice. It is in conflict with the public policy of India and having been made de hors the “arbitral procedure” as defined in Section 34(2)(v) of the 1996 Act. It is therefore *ex facie* illegal and beyond jurisdiction. Where the arbitral procedure is specified and/terms agreed upon, the Arbitral transgression of the procedure will render the Award without jurisdiction as held by the Hon’ble Supreme Court in the matter of **ONGC Vs. SAW Pipes Ltd.**, 2003 (5) SCC 705.

9.1 The learned Arbitrator has erroneously noted in the Award that the work was completed by the respondent on 18th May, 1998, whereas in reality the work was abandoned by the respondent and never completed according to the terms of contract who failed to appreciate that letters dated 11th January, 1999 and 31st March, 1999 were not sufficient to prove Claim No.2.

9.2 The Award has been made ignoring the agreed terms that the respondent-claimant could have been entitled to claim escalation during the period of the contract and paid the same for extended period, only if the

competent authority of the department was of the view that the delay in execution of the work had not been attributable to the respondent. The learned Arbitrator failed to appreciate that since the delay was attributed to the respondent/claimant (consequent in the penalty), no escalation was payable thereafter from December, 1995 till 30th June, 1998, after making deduction of the amount spent on the execution of the balance quantities by ignoring the Condition 46 of the GCC made it obligatory on the respondent-claimant to submit “Bar Chart” to the petitioner department. Since the respondent failed to submit the said Bar Chart within the stipulated time the work was delayed and had serious bearings in execution of work in a time bound manner.

9.3 The learned Arbitrator has erred in awarding interest @ 12% on the Claims in favour of the respondent/claimant from the dates indicated in the Award in total disregard of catena of judgments, especially since Claims 1 and 4 were never in dispute and has wrongly awarded the legal fee, arbitration fee and expenses to the tune of ₹1,77,000/- in favour of the respondent/claimant.

10. The respondent on the other hand denied each and every contentions raised by the petitioner. Mr. Vivekanand, learned counsel appearing on behalf of respondent submits that the objections filed by the petitioner are not maintainable as the learned Arbitrator has dealt with each and every aspect of the matter.

11. Mr. Vivekanand, Advocate submits that the Arbitral Tribunal has considered the allegations on the issue of delay and has come to finding in award by referring the documents filed by the petitioner that it is admitted by the petitioner that there was delay due to revision of drawings and delay

in supply of cement and steel. The Arbitral Tribunal has also found that there were hindrances at site which were not removed by the petitioner and ultimately the respondent volunteered to remove the same for extra payment made by the petitioner.

12. Under Claim No.3 the Arbitral Tribunal has found that it is admitted by the petitioner till February 1995 escalation has been paid and by 12th December, 1995, 95% work was complete. These findings of fact have not been challenged by the petitioner. In ground G of the objection that the delay was on the part of the respondent contractor from December 1995 to May 1998 and the LD of ₹20,000/- pertained to this period and as such 10CC is not payable. Thus the delay till November, 1995 on the part of petitioner is admitted by the petitioner.

12.1 For the period from December, 1995 respondent has relied on documents letters dated 19th December, 1995 C-33, 2nd March, 1996 C-35, 11th March, 1996 C-39, 9th July, 1998 C-40 and 5th January, 1999 C-41. The Arbitrator on appreciation of documents on record, in award has found that the letters written thereafter till May 1998 the delay was on the part of the petitioner. In admission and denial statement dated 22nd August, 2006 filed before the Arbitral Tribunal the petitioner has stated that “regarding acceptance and denial of the documents submitted by the respondent all documents are accepted and as per the record”. There was no rebuttal to the contents of these letters of the respondent by the petitioner at the relevant time. In view of these contradictory stand the Arbitrator has found in award that since there is no rebuttal to these letters of the claimant attributing delay to the petitioner, so it is mere excuse that the letters are not available. Thus there being no delay on the part of the respondent even from December,

1995, as found by the Arbitrator who held that the imposition of penalty/compensation of ₹20,000/- was unjustified. The said delay in execution of the work was due to lapses on the part of the petitioner.

12.2 The findings of fact on the question of delay are based on documents and evidence taken by the Arbitrator who has taken a plausible view. It was also an undisputed fact that the proposed final bill of the petitioner department was signed under protest.

12.3 The award of the Arbitrator under claim No.1(a) for ₹1,24,543/- the final bill prepared by the petitioner and signed under protest by the respondent but not paid has not been challenged by the petitioner. Similarly, the award of refund of security deposit as awarded under claim No.4 ₹1,00,000/- has not been challenged by the petitioner. There is no specific objection to the award of the claim No.2(b), 3 and 5 also.

12.4 Under claim No.2(b) the respondent had claimed for certain agreement items got redone by the petitioner as determined during execution as notified vide letters dated 11th January, 1999 (C-42) and 31st March, 1999 (C-43) as per details given in C-56 and further extra items on account of additional heights demanded amongst others vide letters dated 4th January, 1996 C-34 and payable as permissible under Specifications C-57 and C-58 and relevant DSR C-59. In its reply to the claims before the Arbitrator the petitioner has not denied execution of these items nor gave any reason as to why these items as detailed in C-56 were not payable. There was mere denial that the claimed amount is not payable without disclosing any reason. There was no rebuttal to any item in any manner in its evidence by the respondent. Therefore, the Arbitrator has allowed the claim No.2 in favour of the respondent.

13. Under claim No.3 the Arbitrator has awarded escalation payment under clause 10CC which as admittedly part of the contract between the parties. The amount claimed and calculated was not disputed by the petitioner. The only defense was that Upto February, 1995 the escalation has been paid and after February, 1995 to May, 1998 the escalation is not payable because delay was on the part of the respondent and as such the petitioner had imposed penalty/compensation of ₹20,000/- vide letter dated 29th December, 1998 and for this reason it was not payable.

So far as delay is concerned as the Arbitral Tribunal has come a finding that the delay upto May, 1998 was attributable to the petitioner. In this view of the matter the Arbitrator found that the levy of compensation/penalty was unjustified and as such awarded further escalation for the period from March, 1995 to May, 1998.

14. Finding and award of the Arbitrator is in consonance with the judgment of the Supreme Court in the case of **J.G. Engineers Pvt. Ltd. Vs. UOI** reported in (2011) 5 SCC 758 where in paras 22 and 23 the Supreme Court has held that notwithstanding penalty/compensation imposed by the department/employer for delay, the arbitrator could arbitrate the question as to who was responsible for delay and Arbitrator having gone into the question of delay and recorded a finding that the contractor was not responsible for delay, so the levy of compensation was unjustified was well within his jurisdiction. In paras 29 to 31 of the judgment it has been held that once the delay has been held on the part of the department and the imposition of compensation goes, the contract is entitled to payment under clause 10CC and other claims for losses.

15. With regard to claim No.5 also there is no specific ground of

objection taken by the petitioner except the question of delay, which has been found by the Arbitrator on the part of the petitioner. The claim No.5 is on account staff, establishment and overhead expenses for the period 20th July, 1995 to March 1996 and only watch and ward expenses and overhead expenses for the period April, 1996 to May, 1998.

The petitioner has mainly contested the claim on the basis that delay was not attributable to the petitioner, which has been found by the Arbitrator on the part of the petitioner. The said claim was proved by way of evidence on affidavit by the respondent. There was no rebuttal to the claim the petitioner in its affidavit by way of evidence either with reference of any amount of claim or item of claim or condition of contract. Thus the Arbitrator had awarded the claim.

16. The only objection of the petitioner now against this claim is that watch and ward or chowkidars were not there. Apart from the wages rolls to this effect were filed before the Arbitrator, otherwise also the petitioner could not give any answer before the Arbitrator that if watch and ward was not there then who deployed the chowkidars at site from the date of award till completion for watch and ward of departmental issues materials cement and steel, contractors materials and machineries at site and work done at site till it was taken over in May 1998 after completion. Thus the award and findings under claim No.5 are also as per record and evidence available before the Arbitrator.

17. Under claim No.6 the Arbitrator has awarded pendente lite and future interest @ 12 % simple and under claim No.7 has assessed and awarded cost of ₹1,77,000/- which he was empowered to do under Sections 31 (7) and 31 (8) of the Arbitration Act, 1996.

18. The objections to the award are beyond the ambit and scope of Section 34 of the Arbitration and Conciliation Act, 1996 as none of the objections or grounds for challenging the award fall under any of the provisions of the Section 34(2) of the Arbitration and Conciliation Act, 1996. The petitioner has raised and re-agitated all such issues and made all such contentions on merits which were made and could have been made before the Arbitrator and have been gone into and decided by the Arbitrator.

19. The Arbitrator after considering the rival contentions of the parties and documents filed and evidence adduced or produced before him has come to a finding of facts based thereon which is final and binding as this Court is not sitting in appeal over the award of the Arbitrator and would not go into the merits of the case and would not appreciate the evidence and documents before the Arbitrator. View/interpretation of a contract or document or evidence as taken by the Arbitrator is final and binding even if erroneous but a plausible view.

20. The arbitrator has given reasons and his thought process or accepting or rejecting a contention or claim of any party and the Court in objections to the award would not go into reasonableness of reasons as the Arbitrator is not supposed to write a detailed judgments like that of the court. It has been so held by the Hon'ble Supreme Court in the following judgments:

- (i) ***Sudershan Trading Co. v. Govt. of Kerala***, AIR 1989 SC 890, para 29 regarding reasons and appreciation of evidence and para 31 that court cannot substitute the view of the arbitrator and interpretation given to a document or contract.
- (ii) ***Hindustan Construction Company v. State of Jammu and Kashmir***, Three Judge Bench reported in JT 1992 (%) SC 325. Both the above

judgments are under old Act.

- (iii) In a judgment under Section 34 of the Act of 1996 the Supreme Court in the case of *Mcdemott International v. Burn Steel* reported in 2006 (2) ALR 498 (SC) in para 55 has held that court cannot correct the errors of the Arbitrator and the interference by the Court is envisaged only in case of fraud or bias or violation of principles of natural justice; in para 117 how computation of the award of damages is to be done is within the jurisdiction of the arbitration only; para 119 that construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the vide nature, scope and ambit of arbitration agreement and correspondence exchanged between the parties is to be taken into account for construction of contract and construction of contract is within domain of the Arbitrator to determine; para 140 finding arrived by the Arbitrator on appreciation of evidence cannot be said to be perverse.
- (iv) *J.G. Engineers Pvt. Ltd. v. UOI and Another* (2011) 5 SCC 758; para 10 that a civil court examining the validity of award under Section 34 exercises supervisory jurisdiction and not the appellate jurisdiction; para 22 and 23 who was responsible for delay in execution of the work is an arbitrable dispute within jurisdiction of the Arbitrator; para 27 court can set aside award under Section 34 only if it is in conflict with public policy i.e. (a) contrary to fundamental policy of India or (b) contrary to interest of India or (c) contrary to justice or morality or (d) patently illegal. The patent illegality should go to the root of the matter and not a trivial illegality or if shocks the conscience of the Court.

21. From the perusal of the award of the Arbitrator it is evident that in fact the Arbitrator has noted all the contentions of both the parties with regard to facts and claims of the claimant. Therefore, the objections filed by the petitioners are liable to be dismissed.

22. No costs.

(MANMOHAN SINGH)
JUDGE

MAY 31, 2013