

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 26.11.2013

+ **FAO(OS) 542/2013**

UNION OF INDIA

..... Appellant

versus

JAGDISH CHAND GUPTA

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr J. K. Singh.

For the Respondent : None.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No.18619/2014 (Exemption)

The exemption is allowed subject to all just exceptions.

CM No. 18616/2013 (delay)

The delay in filing the appeal is condoned.

FAO(OS) 542/2013 & CM No.18617/2013

1. This appeal is directed against the judgment dated 30.07.2013 delivered by a learned Single Judge of this Court in OMP No.240/2013, which was a petition under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the appellant herein. The appellant has challenged the

majority award dated 17.09.2012. The learned Single Judge, by virtue of the impugned judgment had dismissed the appellant's petition and the challenge to the said award.

2. The appellant had challenged the award in respect of three claims- Claim Nos.1, 2 and 4. All the other claims preferred by the respondent had been rejected by the Arbitral Tribunal.

3. The respondent had been awarded the works – 'Construction of single line Railway Bridge No.27 consisting of Superstructure of Prestressed Concrete Girder (6x34m) and sub structure with RCC abutments and piers as per approved plans on Udhampur-Katra section of Udhampur Srinagar Baramulla Rail Link Project (hereinafter referred to as the 'Works'). It is evident from the work that the same was to be executed in the State of Jammu and Kashmir.

4. Claim No.1 pertains to the reimbursement of turnover tax (sales tax). The respondent had launched a claim for a sum of ₹15,25,725/-. However, the Arbitral Tribunal awarded a sum of ₹13,35,353/-. The contention with regard to this claim, on behalf of the appellant, was that the same could not have been awarded by the Arbitral Tribunal, inasmuch as, on the date on which the letter of acceptance was issued i.e. on 26.02.1999, a turnover tax had already been notified by the Government of Jammu & Kashmir on 23.07.1997 and, therefore, the same had to be borne by the respondent and not by the appellant. The respondent, however, had placed reliance on Clause 33 of the contract between the parties, which reads as under:-

"33.0 TURN OVER TAX

At present no sales tax on contract turnover is being charged from contractors in Jammu & Kashmir State. In case the sales tax on contract turnover is charged from the contractor for present work, the same shall be reimbursed by the Railway based on production of documentary evidence viz. valid Registration number."

5. On a plain reading of the above extracted Clause 33.0 of the contract, it is evident that the appellant had agreed to reimburse the respondent in case sales tax on contract turnover was charged from the contractor for the subject works. The learned counsel for the appellant may be right in stating that the 1st part of Clause 33 may not be correct, inasmuch as, when the contract had been entered into the Government of Jammu and Kashmir had already notified the levy of turnover tax. Be that as it may, the indication given in Clause 33 is clear that in case a turnover tax is charged in respect of the subject works, the same would be reimbursed by the railway based on the production of documentary evidence etc. The intention of the parties was to enter into the contract exclusive of taxes and this fact has been noted by the learned Single Judge in the impugned judgment wherein he has observed that it is not unknown to law, that parties enter into contract for a consideration which is exclusive of taxes and that the burden of taxes is required to be borne by the employer even though in law the liability, in the first instance, may fall on the contractor. It is on this basis that the learned Single Judge rejected the objection raised by the appellant. There is no cause for interference with this conclusion of the learned Single Judge as also of the Arbitral Tribunal which granted reimbursement to the respondent to the extent of ₹13,35,353/- under this head.

6. Claim No.2 was based upon the additional expenditure incurred due to revision of the foundation drawings. The respondent had claimed an amount of ₹70 lacs under this head. However, the Arbitral Tribunal upon going through the facts of the case awarded an amount of only ₹15,60,000/- against the said claim. On behalf of the appellant, it was contended that this claim ought not to have been granted in view of paragraph 7.1 of the tender conditions and paragraph 11.3 of the Northern Railways General Conditions of Contract 1999. It was contended that by virtue of the paragraph 7.1, the railways were entitled to modify the drawings during the currency of the execution of the subject works, without the railways being made liable for any claim on account of such changes. It was further contended that paragraph 11.3 of the tender conditions of contract provided that the contractor could not claim damages or compensation in the event of failure or delay on the part of railways to provide the necessary drawings or instructions. However, the learned Single Judge after examining the rival contentions on this aspect of the matter came to the conclusion that on facts it had been established before the Arbitral Tribunal that the revision of the foundation drawings was done by the appellant after the excavation had been completed. Had the revision been done prior to the execution work, then, possibly, the argument raised on behalf of the appellant might have had some substance. The learned Single Judge also came to the conclusion that paragraph 7.1 of the tender conditions as well as paragraph 11.3 of the General Conditions of Contract did not come in the way of the respondent in claiming additional expenditure due to the revision of foundation drawings which was revised after the excavation had been completed. It is not as if the contractor was claiming damages or compensation for the

failure or delay on the part of railways to provide the necessary drawings or instructions. The claim was based on the additional expenditure which the respondent had to incur due to the revision of the foundation drawings after the excavation work had been completed. In any event, these were based on findings of fact with regard to which there was no perversity. Furthermore, the view taken by the Arbitral Tribunal as also the learned Single Judge is a reasonable view and, therefore, no interference is called for at this stage.

7. Lastly, the appellant contended that Claim No.4 could not have been awarded. This claim was for price adjustment and as against the claimed amount of ₹30,12,868/-, the Arbitral Tribunal awarded a sum of ₹12,78,553/- to the respondents. The claim was based on the extension of time granted on account of delay in execution of the works in issue. The case of the respondent was that while the appellant had granted price adjustments in respect of the first and fifth extensions it had not granted any price adjustments with regard to the second, third and fourth extensions. It was further contended that while granting the first and fifth extensions, a penalty had been imposed by the appellant on the respondent yet price adjustment had been allowed. It had been contended by the respondent that there was no logical basis for not allowing the price adjustment in respect of the second, third and fourth extensions when the appellant had not imposed any penalty on the respondent. In this context, the learned Single Judge had made the following observations:-

“19.2 Therefore, there is an obvious rationale in approach adopted, that where no penalty was levied, it was perhaps

railways' own assessment of the matter, that the fault, if any, for delay for the periods covered by second, third and fourth extension did not lie with JCG and, therefore, there was no reason not to award price adjustment under the price variation clause.”

8. However, on going through the record and, particularly, page 98 of the appeal paper book, we find that insofar as the first extension was concerned, price adjustment had been granted under the price variation clause and no penalty had been imposed. As regards the second, third and fourth extensions, no price adjustment was granted and no penalty was imposed. Insofar as the fifth extension is concerned, no price adjustment was allowed but a penalty had been imposed. From this we may point out that the observations of the learned Single Judge that, the railways on the other hand even for the period where penalty was imposed (i.e. first and fifth extension) had granted price adjustment in favour of the contractor, was not accurate. However, despite this we feel that the Arbitral Tribunal was persuaded by the fact that, insofar as, the second, third and fourth extensions were concerned, no penalty had been imposed and therefore, it could be understood that the extension of time was not on account of the respondent contractor and for that reason price adjustment under the PVC clause was allowed. No price adjustment was allowed insofar as the fifth extension was concerned because a penalty had been imposed. Insofar as the first extension is concerned, no further award was necessary because the appellant itself had granted price adjustment. It is also pertinent to note that the price adjustments were granted upto 31.10.2003. The fifth extension was beyond that period of time and, therefore, no price adjustment was

allowed by the Arbitral Tribunal. In fact, for all subsequent extensions, namely, the sixth, seventh, eighth and ninth extension, no price adjustment was allowed by the Arbitral Tribunal.

9. It is, therefore, clear that there is an obvious rationale behind allowing of the claim to the extent indicated above, insofar as, the head of price adjustment is concerned. The Arbitral Tribunal allowed adjustments upto 31.10.2003 in cases where the appellant had not imposed any penalty. This is based on the interpretation of the contractual terms between the parties and interpretation, it is well settled, is clearly within the realm of arbitration. No perversity had been pointed out so as to enable us to interference with the award on this aspect of the matter also. In view of the foregoing discussion, the appeal has no merit. The same is dismissed.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

NOVEMBER 26, 2013

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