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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 23.07.2013

Judgment delivered on: 30.07.2013

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O.M.P. No. 240/2013

UNION OF INDIA

..... Petitioner

Vs

JAGDISH CHAND GUPTA

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr J.K. Singh & Mr Anirudh, Advocates.

For the Respondent: Mr S.W. Haider, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1. This is a petition which seeks to assail a majority award dated 17.09.2012 (sic. 30.08.2012). The dissenting award is passed by Ms Ambika Jain, who at the relevant time was holding the post of Deputy CAO. She presently holds the post of Director/ Finance / Stores-I in the Railways. The two arbitrators who form part of the majority, Mr Balbir Singh and Mr V.K. Gupta, continue to hold the post of Deputy Chief Engineers, though in different departments. Pertinently, all three arbitrators were appointed by the petitioner.
2. The challenge is laid to all three (3) claims awarded in favour of the respondent; in the background of the following brief facts.

3. On 26.02.1999, the respondent was awarded the following works post issuance of an acceptance letter: “Construction of single line Railway Bridge No. 27 consisting of Superstructure of Pre-stressed Concrete Girder (6x34 m) 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').”

3.1 The tenure of the contract was 24 months, while the cost of work was pegged at Rs. 406.88 lacs. Admittedly, the cost of works was revised due to increase in quantities.

3.2 As averred by the petitioner, two corrigendums were issued. The first corrigendum pegged the cost of works at Rs. 560.81 lacs, while the second corrigendum, apparently, scaled it down to Rs. 551.71 lacs.

4. Since disputes arose between parties, the matter was referred to a panel of three arbitrators, as indicated above.

5. Being aggrieved by the majority award, a petition under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) was filed; albeit with an application for condonation of delay.

5.1 By an order dated 23.07.2013, for the reasons set out therein, delay was condoned by me. Arguments were heard on merits and judgment was reserved on the same date

5.2 For the sake of convenience, I will be referring to the petitioner as Railways and the respondent, i.e., Shri Jagdish Chand Gupta as JCG.

6. The challenge is laid to the following three claims by the railways. These claims being: claim no. 1, 2 and 4. Since claim nos. 3, 5, 6 & 7 were rejected, obviously there is no challenge to the same. Pertinently, no cross

objections, have been filed by JCG. I therefore, propose to deal with the objections of railways in seriatum, i.e., claim wise.

CLAIM NO. 1

7. This claim pertains to reimbursement of turnover tax (sales tax). JCG had lodged a claim for a sum of Rs. 15,25,725/- whereas it has been awarded a sum of Rs. 13,35,353/- by the arbitral tribunal.

8. Mr Singh on behalf of the railways has argued that the turnover tax was notified by the Government of J&K on 23.07.1997. The letter of acceptance was issued to JCG on 26.02.1999 and, therefore, railways was entitled to deduct turnover tax at the rate of 2.1% from the bills of JCG. It was argued by Mr Singh that JCG being the contractor for the works in issue, could not benefit out of taxes, which were legitimately deducted and deposited by the railways with the concerned statutory authority.

9. Though, neither in the course of arguments nor, in the written submissions, there is any reference to the policy circular of the railways dated 21.03.2003, it appears that railways relied upon the said policy letter to justify its stand that the said claim of reimbursement of turnover tax had to be rejected. The basis for such a stand appears to be that the policy letter of railways seemingly justifies deduction of turnover tax in respect of all contracts which were finalized between the period 23.07.1997 (i.e., the date when the tax was notified) and 31.03.1999. There is a reference to this aspect at page 9 of the petition.

10. Mr Haider, on the other hand, in my view quite correctly relied upon clause 33 of the contract obtaining between the parties to rebut the contention of the railways. It may be relevant therefore for the sake of convenience to extract clause 33 of the contract:

"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."

11. A bare perusal of the clause would show that the clause 33 clearly exemplified the fact that on the date when parties had entered into the contract in issue, turnover tax, was not being collected or, charged by the State of J&K, from contractors. The clause, goes on to say, in no uncertain terms, that in case turnover tax is charged, railways will bear the burden by reimbursing the amount on production of relevant documentary evidence in that behalf. There is a clear finding of the arbitral tribunal that a sum of Rs. 13,35,353/- was deducted from the bills of JCG. Therefore, if the plain language of clause 33 is to be applied to the instant situation undoubtedly, as found by the arbitral tribunal, JCG's claim for reimbursement of turnover tax has to be sustained.

12. The argument of the railways that the determinative factor should be the terms contained in the policy letter of 21.03.2003 cannot be accepted as it is an unilateral document generated by the railways, post the issuance of the letter of acceptance, when the contract between the parties was firmed up. Therefore, as correctly held by the arbitral tribunal, policy letter of 21.03.2003 can have no bearing on the provisions of clause 33 of the contract. It is not unknown to law, that parties enter into contracts for a consideration which is exclusive of taxes. In other words, the burden of taxes is required to be borne by the contractee even though in law the

liability in the first instance may fall in the contractor. Accordingly, objections qua this claim are rejected.

CLAIM NO. 2

13. In respect of this claim the arbitral tribunal has awarded JCG an amount of Rs. 15,60,000/- against the total claim of Rs. 70 lacs. The arbitral tribunal has awarded the said amount towards additional expenditure incurred by JCG due to revision of foundation drawings.

14. Mr Singh in support of his objections submits that the said claim was wrongly awarded in favour of JCG in ignorance of paragraph 7.1 of the tender conditions and paragraph 17-A (iii) (sic 11.3) of the Northern Railways General Conditions of Contract 1999 (in short the GCC). Mr Singh contended that under para 7.1 of the tender conditions the railways is entitled to modify the drawings during the currency of the execution of the works in issue, without railways being made liable for any claim on account of such changes. He further contended that para 17-A (iii) (sic 11.3) of the GCC clearly provided that the contractor could not claim damages or compensation in the event of failure or delay on the part of railways to provide necessary drawings or instructions. In sum and substance it was the contention of Mr Singh that revision of drawings could not have entitled JCG to lay claim for additional expenditure incurred on account of such revisions. It was thus, Mr Singh's contention that, the arbitral tribunal had gone beyond the terms of the contract, in awarding the said claim.

15. Mr Haider, on the other hand submitted that revisions in drawings were made after the excavation work was carried out by JCG, which resulted in JCG incurring additional expenditure. The sums claimed under this head

were only in the nature of reimbursement of such expenditure, incurred by JCG.

16. Having heard the two counsels, in my view, the arbitral tribunal having appreciated the evidence on record, has come to a finding of fact that on each occasion revision was carried out post the excavation. It may be noted that the period over which excavation was carried out is given rather cryptically in the award which seems to suggest, though not quite accurately that, at least in excavation of P-3 and A-2, revised drawings were submitted prior to the dates of excavation. But this aspect becomes clear on a close perusal of the dates provided, quite fairly by the railways, which sets out the period during which excavation was carried out with regard to P-4, P-3 and A-2. For the sake of convenience the same are set out hereinbelow in a tabulated form.

16.1 The claim has been allowed towards excavation of works, which are marked as P-4, P-3 and A-2.

16.2 The dates on which excavations were carried out in respect of the said works, and the dates on which revised drawings were submitted are set out in seriatum hereinbelow:

S. No.	Date on which excavation carried out	Date on which revised drawings issued
1	P-4: 07.06.1999 (*In the award the date noted is 02.06.1999) to 20.06.1999	19.07.1999
2	P-3: 09.06.1999 to 26.12.1999	19.07.1999
3	A-2: 24.06.1999 to 12.12.2000	24.10.2000

17. A perusal of the table would show that revised drawings were submitted in each case after excavation work had commenced. Therefore, it is quite evident, as found by the arbitral tribunal, that additional work had to be carried out. The argument of Mr Singh that railways was entitled to modify the drawings in terms of paragraph 7.1 of the tender conditions or could not have been mulcted with damages on account of either a failure to supply or even where there was a delay in supplying drawings – is not sustainable as it is neither a case of modification of drawings or failure or even delay in supplying drawings. The instant case is one where excavation work was carried out with one set of drawings, and thereafter, additional work had to be carried out in line with the revised drawings. As correctly found by the Tribunal, JCG was entitled to reimbursement of such additional expenditure which could not have been circumscribed by taking recourse to either the provisions of paragraph 7.1 of the tender conditions or clause 17-A (iii) (sic. 11.3) of the GCC.

CLAIM NO. 4

18. Under this head price adjustment has been awarded to JCG in the sum of Rs. 12,78,553/- against a total claim of Rs. 30,12,868/-.

18.1 Mr Singh has submitted that the said claim was wrongly awarded in favour of JCG by the arbitral tribunal, disregarding the fact that he had been accorded a total of nine (9) extensions on account of delay in execution of the works in issue. It was Mr Singh's contention that the reasoning of the arbitral tribunal was flawed in as much as it awarded price adjustment, under the price variation clause, for the second, third and fourth extensions granted by railways, on the ground that railways had not imposed penalties qua the said extensions.

18.2 It was argued that the grant of price adjustment, under the price variation clause, had nothing to do with the imposition of penalty for delay in execution of the work. It was Mr Singh's submission that extensions were granted by the railways after due deliberation, at which point in time, it was also decided that price adjustment would not be granted to JCG. The submission was that, since the railways had suffered losses on account of delay post the fourth extension, it had imposed penalty on JCG.

18.3 The linking of price adjustment with penalties, according to Mr Singh, had no rationale or legal basis.

18.4 Mr Singh in support of the submission relied upon paragraph 17(4) of the GCC to contend that even during the extension of the initial period provided for completion of works in issue, time remained the essence of the contract. He contended that after the first extension of the contract by the competent authority, i.e., till 25.06.2001, JCG was primarily responsible for the delay in the execution of the contract and hence, extensions were granted; albeit without price adjustment.

19. Mr Haider, on the other hand, submitted that the railways itself was not consistent in its approach, in as much as, even though the first extension was granted after imposition of penalty, price adjustment was awarded by the railways. In respect of fifth extension, a similar approach was adopted by the railways. Therefore, the finding of the arbitral tribunal that price adjustment had to be accorded in favour of JCG for second, third and fourth extensions as no penalty was levied, is quite in order.

19.1 It may be pertinent to note that a hand written chart submitted by Mr Singh, along with his written submissions, is contrary to the contents of documents filed by the railways pertaining to extensions granted to JCG.

The extension letters are found at pages 43 to 51 of the documents file, filed by the railways alongwith the present petition. As quite correctly pointed out by Mr Haider, the first extension letter, which is appended at page 43 granted extension of completion of work from 26.02.2001 to 25.06.2001 with penalty, and similarly, the fifth extension granted to JCG upto 31.03.2004, is also accompanied with imposition of penalty. However, in both cases, price adjustment has been accorded in favour of JCG under the price variation clause.

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.

19.3 The argument that the two are not related, may not be quite appropriate, in my opinion. Surely, it had to be an implied term of the contract, that no party could claim enhancement of price on account of labour, material or fuel oil for the delay, in execution of the work, attributable to it. It was open to the railways to impose penalty, where it was of the view that the delay was attributable to JCG, and thus, deny price adjustment under the price variation clause. However, the railways, on the other hand even for the period where penalty was imposed, (i.e., the first and the fifth extension) accorded price adjustment in favour of JCG. Thus, quite clearly, as held by the arbitral tribunal, for the period where no penalty was imposed JCG was rightly entitled to price adjustment.

19.4 In any event, these are aspects in my view, which were in the realm of the jurisdiction of the arbitral tribunal. The arbitral tribunal having

appreciated the material on record, and the provisions of the contract, found the claim sustainable. In my view, the arbitral tribunal did not act beyond its jurisdiction or contrary to the terms of the agreement obtaining between the parties in sustaining this claim of JCG. Accordingly, the award of this claim by the arbitral tribunal is also upheld.

20. In view of the discussion above, in my opinion, the petition has no merit and is accordingly dismissed. Parties shall, however, bear their own cost.

RAJIV SHAKDHER, J.

JULY 30, 2013

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