

IN THE HIGH COURT OF DELHI AT NEW DELHI

OMP No. 233 of 2007

Reserved on: February 04, 2014

Decision on: February 10, 2014

GOVT. OF NCT OF DELHI

..... Petitioner

Through: Mr. Sushil Dutt Salwan, Addl.
Standing Counsel with
Mr. Pratap Singh, Advocate

versus

M/S. NAV NIRMAN CONSTRUCTION CO. Respondent

Through: Mr. Sandeep Sharma with
Mr. Amit Choudhary, Advocates

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

10.02.2014

1. This is a petition by the Government of National Capital Territory of Delhi ('GNCTD') through its Executive Engineer, Irrigation and Flood Control Department praying that the Award dated 19th January 2007 passed by the learned Arbitrator be set aside.

2. The background to the present petition is that the Respondent, M/s. Nav Nirman Construction Co. ('NNCC') was awarded the work for construction of an inlet/outfall structure of a DDA storm water drain by letter dated 9th November 1992. Subsequently, an agreement dated 18th November 1992 was entered into between the parties. The stipulated date for completion of the work was 15th May 1993. The contract was, however,

rescinded by the Petitioner on 1st September 1993 and the work was completed through another contractor.

3. NNCC filed Suit No. 2483 of 1993 seeking appointment of an arbitrator to adjudicate the disputes between the parties in terms of Clause 25 of the Agreement. Pursuant to an order dated 1st March 1999 passed by the Court in the aforementioned suit, the Chief Engineer, I & F Department of GNCTD, appointed Mr. A.S. Gahlawat, Chief Engineer (Retd.) as the sole Arbitrator, who entered reference on 7th July 1999. NNCC filed its statement of claims and the GNCTD filed its statement of defence as well as counter claims ('CCs').

4. By an Award dated 12th May 2000, the learned Arbitrator allowed NNCC's claims and rejected the GNCTD's CCs. The objection to the Award filed by the GNCTD, in the form of OMP No. 218 of 2000, was allowed by the Court on 31st July 2002. While setting aside the Award dated 12th May 2000, the Court directed the learned Arbitrator to dispose of the claims and CCs afresh.

5. Pursuant to the aforementioned above order, the learned Arbitrator again entered upon reference, held further proceedings and passed a fresh Award dated 16th September 2002. The GNCTD objected to the Award by filing OMP No. 416 of 2002. On 18th January 2005, this Court passed an order in the said petition, adjourning it *sine die*, with a direction to the learned Arbitrator to resume the proceedings and give reasons for the findings returned in the Award dated 16th September 2002.

6. For the third time, the learned Arbitrator held several arbitration proceedings and passed the impugned Award dated 19th January 2007.

7. One of the first grounds urged is that, contrary to the specific directions issued by the Court in its order dated 18th January 2005, the learned Arbitrator has not, in fact, given reasons for the conclusion in respect of the different claims made by the NNCC and has virtually repeated his earlier Award, which was set aside by the Court on 31st July 2002. Mr. Sushil Dutt Salwan, Additional Standing Counsel for GNCTD, referred to the decisions under claims (iii), (iv) and (v), which simply state that for the reasons in the said claims, reference should be made to the reasons already given under claims (i) and (ii). Mr. Salwan further submitted that if, indeed, the above claims were components of claim (xvii), then there was no justification for the learned Arbitrator to have again awarded a separate sum of Rs. 2,00,000 under claim (xvii).

8. Mr. Sandeep Sharma, learned counsel for the Respondent on the other hand, points out that the learned Arbitrator has explained, both under Claims (i) and (ii) and again under claims (iii) to (viii), that they were all components of all claims for profit and loss under claim (xvii). Mr. Sharma further submitted that the Award in respect of claim (xvii) was not challenged by the Petitioner on the ground now urged and was therefore impermissible. He relied on the decision in *Bijendra Nath Srivastava v. Mayank Srivastava (1994) 6 SCC 117*. Mr. Sharma tried to explain that what was awarded under claim (xvii) was over and above claims (i) to (viii) since the concept of loss of profit was well recognized in terms of the

law explained in *Hind Construction Contractor v. State of Maharashtra AIR 1979 SC 720* and *M/s A.T. Brijjal Singh v. State of Gujarat AIR 1984 SC 1703*.

9. A perusal of the impugned Award shows that, indeed, claims (i) to (viii) have been treated by the learned Arbitrator to be the components of claim (xvii), which is for a sum of Rs. 6,40,000 towards loss of profit. The opening paragraph of the Award in respect of claim (xvii) states: "In consideration of the separate claims framed by the claimant and adjudicated by me being claim nos. 1,2,3,4,5,6,7,8, which are intrinsically and essentially components of this claim and have been decided accordingly in addition to the decision of this claim." It is not understood why if, indeed, claims (i) to (viii) are intrinsically and essentially components of the claim for loss of profit then in addition to those claims, a separate sum of Rs. 2,00,000 could be awarded under claim (xvii). The plea that such a ground was not urged by the Petitioner is not entirely correct since a challenge has been raised in the grounds to the validity of the Award in respect of claim (xvii). Also, while the law settled in the above decisions is unexplainable, the fact remains that the learned Arbitrator has failed to give any reasons whatsoever in awarding Rs. 2,00,000 under claim (xvii) towards loss of profit, in addition to the Award in respect of claims (i) to (viii), which are stated to be the components of the claim for loss of profit. To that extent, it must be held that no reasons have been given by the learned Arbitrator as regards claim (xvii) and the impugned Award to that extent is not in conformity with the specific directions issued by the Court on 18th January 2005 in OMP No. 416 of

2002. Consequently, the Award under claim (xvii) of Rs. 2,00,000 in favour of NNCC is hereby set aside.

10. As regards the Award in respect of claims (i) to (viii), the view taken by the learned Arbitrator that they were all individual components of larger claims for loss of profit is plausible. Although Mr. Salwan was critical of the award of depreciation under claim (vi), when such claim is viewed as a component of loss of profit, it is understandable why such claim was entertained. Further, once the learned Arbitrator found that there was a breach of contract by the GNCTD, the reasons given for the award under claims (i) and (ii) would hold good for the award under claims (iii) to (viii). Consequently, this Court is not inclined to interfere with the impugned Award as regards claims (i) to (viii).

11. It must be noted that there is no objection by the Peittioner as regards the Award in respect of claims (ix) to (xi). Claims (xii), (xiii) and (xv) have been disallowed. The refund of earnest money under claim (xiv) was a logical extension of the finding of the learned Arbitrator regarding the illegal termination of the contract by the GNCTD. The refund of security deposit of Rs. 20,000 cannot, therefore, be said to suffer from any legal infirmity.

12. Mr. Salwan submitted that the Award itself was based on fictitious documents, which ought not to have been relied upon by the learned Arbitrator.

13. The Court finds that the above submission overlooks the fact that despite repeated opportunities, the GNCTD failed to produce the records before the learned Arbitrator, leaving him with no option, but to proceed on the basis of the documents on record. In particular, the Court would like to refer to the following paragraph in the preamble to the Award:

“And whereas, the respondent sought repeated adjournments of the case before me for one reason or the other purportedly due to non-availability of the relevant records at their end; engagement of counsel, proper briefing etc. etc. in the proceedings before me dated 4.2.2005, 26.2.2005, 11.3.2005, 23.3.2005, 8.4.2005, 4.5.2005, 24.5.2005, 6.6.2005, 20.6.2005, 8.7.2005, 22.7.2005, 3.8.2005, 14.10.2005, 5.11.2005 and 14.11.2005.”

14. With the GNCTD not making available the original documents before the learned Arbitrator, it cannot be permitted to urge that the learned Arbitrator proceeded on the basis of fictitious documents. There was no way the learned Arbitrator could have dealt with the above submission in the absence of the original records.

15. For the same reason, the learned Arbitrator was also justified in rejecting the CCs of GNCTD.

16. On the question of award of interest under claim (xvi), it is seen that the learned Arbitrator awarded interest @ 18% p.a. in favour of the claimant with effect from 28th October 1993 till the date of payment. In view of the law explained by the Supreme Court in ***Krishna Bhagya Jal Nigam Ltd. v. G. Harischandra Reddy AIR 2007 SC 817***, and in particular, in view of the long pendency of the arbitration proceedings, the

Court is inclined to modify the above rate of interest and direct that the GNCTD will pay NNCC simple interest @ 9% p.a. from 28th October 1993 till the date of payment which shall not be later than eight weeks from today. Any delay in making payment beyond that period would attract simple interest at 12% per annum for the period of delay.

17. Consequently, the impugned Award dated 19th January 2007 of the learned Arbitrator is modified as under:

- (i) The award of Rs. 2,00,000 under claim (xvii) is set aside.
- (ii) The award of interest under claim (xvi) is modified by directing that GNCTD will pay NNCC simple interest @ 9% p.a. on the awarded amount from 28th October 1993 till the date of payment which shall not be later than eight weeks from today. For the period of any delay in making payment beyond that period, GNCTD will pay NNCC simple interest at 12% per annum on the awarded amount for the period of delay.
- (iii) In all other respects, the impugned Award dated 19th January 2007 is upheld.

18. The petition is disposed of in the above terms. Decree sheet be drawn up accordingly.

S. MURALIDHAR, J.

FEBRUARY 10, 2014

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