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

Judgment delivered on : 20.11.2014

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OMP 385/2009

NATIONAL BUILDING CONSTRUCTION
CORPORATION LTD.

..... Petitioner

versus

KIRI ASSOCIATES PVT. LTD.

..... Respondent

Advocates who appeared in this case

For the Petitioner : Manoj Kumar Dass, Advocate

For the respondent : Mr. Gaurav Puri, Mr. Nupur Pandey, Mr. Aashish
Gumber and Mr. Varun Bhardwaj, Advocates

CORAM

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) whereby challenge has been laid to award dated 30.01.2009 and a supplementary award, which is dated 10.04.2009.

2. In this petition, briefly, the facts obtaining in the case are as follows :-

2.1 the petitioner herein, which is, National Building Construction Corporation Ltd. (in short NBCC) called for tenders for construction of the school building at Jawahar Navodaya Vidyalaya at Chattarpur, M.P.

2.2 The respondent, who had applied against the tender was declared successful. Accordingly, a letter of award dated 18.01.1992 was issued in

favour of the respondent. The tendered value was a sum of Rs.46.58 Lakhs. The contract as per the terms of the agreement was to commence on 29.04.1992. The stipulated period for completion of the work was to expire on 28.04.1993. It is not in dispute that the work was completed beyond the period stipulated. The work in actuality got completed on 04.11.1996.

2.3 Since disputes arose between the parties, an arbitrator was appointed which led to the passing of the award referred to above. An application under Section 33 of the Act was filed which led to the passing of the supplementary award dated 10.04.2009. The respondent (i.e., the original claimant) preferred 18 claims before the learned arbitrator.

2.4 NBCC, on its part, not only defended the claims but also lodged counter claims. The counter claims lodged by the respondent were eight (8) in number. In so far as respondent's claims were concerned, claim nos.1, 2, 3, 8, 10, 11, 12, 15 to 17 were partially allowed. In so far as claim no.18 is concerned, which pertains to interest, the learned arbitrator awarded interest at the rate of 10% p.a. with effect from 04.11.1997 till 30.06.2009, on claim nos.1, 2, 8, 11, 12, 15 and 16.

2.5 As is obvious, claim nos.4 to 7 and 13 were rejected.

2.6 A brief summary of the amount claimed and those awarded by the arbitrator are set up in paragraph 6.14 of the petition. The figures and particulars given therein are not disputed by the respondent. Accordingly, for the sake of convenience, the same are extracted hereinbelow :-

Claims	Nature of Claim	Amount claimed (Rs.)	Amount Awarded (Rs.)
Clam No.1	Balance payment under final bill	18,86,177	4,51,399
Claim No.2	Escalation	2,13,184	1,20,089

	during contractual period		
Claim No.3	Escalation beyond the contractual period	5,01,150	3,26,551
Claim No.8	Additional claim for brick Kiln	5,86,224	2,61,120
Claim No.10	Recovery	18,469	18,469
Claim No.11	Recovery	32,728	32,728
Claim No.12	Overheads for prolongation of contract	18,99,710	2,18,400
Claim No.14	Sales Tax refund	2,50,000	1,05,110
Claim No.15	Security deposit	2,25,357	2,25,551
Claim No.16	Loss on account of pile foundation	1,25,000	50,000
Claim No.17	Loss due to maintenance of office staff and its infrastructure	1,50,000	20,000
Claim No.18	Pre-suit pendente lite and future interest	24% p.a. from date of claim became due	@ 10% p.a. w.e.f. 4.11.97 till 30.01.2009 on Claim no.1, 2, 8, 11, 12, 15, 16 for Rs.26 Lakhs (approx)
TOTAL CLAIMS AWARDED			Rs.45 Lacs (approx)

2.7 I may also note that the counter claims lodged by the NBCC were rejected in entirety.

3. Before me, Mr. Dass, who appears for the NBCC has confined his objections to claim nos.8, 12 and 18.

3.1 In so far as claim no.8 is concerned, it relates to amounts claimed by the respondent towards difference in cost incurred by it in respect of use of kiln bricks as against ordinary bricks of 35 kg./cm² strength. As would be evident from the table above, the sum claimed was Rs.5,86,224/-. The learned arbitrator has awarded only a sum of Rs.2,61,120/-.

3.2 Mr. Dass submitted that this claim has been wrongly awarded in view of the fact that the respondent was not instructed to use kiln bricks. Mr. Dass also submits that the respondent had made a grievance with respect to the same for the first time only on 21.04.1995, which was when the contract was nearing its end.

3.3 In so far as claim no.12 is concerned, it is Mr. Dass contends that the same ought not to have been awarded for the reason no evidence was produced by the respondent in respect of the claim made for overheads due to prolongation of contract. Mr. Dass says that in any event, there is also an arithmetical error committed by the learned arbitrator in respect of calculation of the sum pertaining to running expenditure. It is stated that the product of 40% of Rs.5,000/- and 40 months (i.e., Rs.2000 x 40) should have been shown as Rs.80,000/- and not Rs.84,000/-, as noted in the award. Therefore, according to Mr. Dass, the total amount which ought to have been shown as awarded should be a figure of Rs.2,14,400/-.

3.4 In so far as claim no.18 is concerned which, as indicated above, relates to interest, Mr. Dass says that there is a prohibition under the contract for grant of interest. For this purpose, he has referred to clause 29 of the contract. In support of his submission, Mr. Dass has placed reliance on a

judgment of the Division Bench in the case of *NBCC Vs. Esel Properties & Industries, 2012 Lawsuit (Delhi) 853*. It is Mr. Dass's contention that this aspect of the matter is covered by the judgment of the Division Bench.

3.5 Furthermore, Mr. Dass has said that by the supplementary award dated 10.04.2009, the learned arbitrator has directed award of interest on interest by observing as follows :-

“..claimant be paid pendente lite interest at the rate of 10% on the total amount of the award from 23.02.2002 to the date of award...”

3.6 It is Mr. Dass's contention that if this direction in the award was to operate then interest would run on the total amount awarded, which includes interest on various claims. Mr. Dass says that this direction deserves to be set aside.

4. On the other hand, Mr. Puri, the learned counsel for the respondent says that in so far as submissions of Mr. Dass in respect of claim no.8 and 12 are concerned, the same ought not to be interfered with. The learned arbitrator has appreciated the evidence on record and returned a finding, which is not perverse and therefore, no interference is called for.

4.1 As regards claim no.18, Mr. Puri says that in view of the position of law with regard to the fetter placed on the arbitrator to grant interest in respect of claims which arise from contract which prohibits payment of interest, he possibly cannot contend to the contrary. The learned counsel submits that position vis-a-vis compound interest would be no different.

5. Having heard the learned counsel for the parties, in my view, in so far as claim no.8 is concerned, there is no dispute about the fact that the BOQ item nos.23, 24, 26 and 27, required the respondent to use bricks of class 35 kg./cm² strength. The arbitrator also noted that CPWD specifications

permitted use of bricks of class 75 kg./cm² and 100 kg./cm². Furthermore, the award seems to clearly indicate that locally, bricks of the specifications indicated by NBCC were not available, and therefore, the respondent used kiln bricks. This fact was within the knowledge of the petitioner as is evident upon perusal of letter dated 29.04.1992; an extract of which is culled out in the award itself.

5.1 Having regard to the findings recorded by the learned arbitrator, in my view, no interference is called for. The NBCC was clearly aware of the fact that the respondent was using kiln bricks. This fact was known to the NBCC, evidently, at least, since 21.03.1992. Therefore, Mr. Dass's contention that this issue was raised for the first time on 21.04.1995 appears to be without merit. The objections vis-a-vis claim no.8 are thus, rejected.

5.2 In so far as claim no.12 is concerned, the arbitrator has awarded a sum of Rs.2,18,400/- qua overheads incurred by the respondent on account of prolongation of the contract. The respondent had claimed under this head, a sum of Rs.18,99,710.30. The learned arbitrator has partially awarded moneys under this claim in view of his finding that the NBCC was mainly responsible for the delay in the execution of the work. Findings to that effect are recorded by the learned arbitrator while discussing claim no.6. Based on this rationale, a part of the claim was allowed.

5.3 The only objection vis-a-vis this claim, which is pivoted on the argument that no documentary evidence was placed on record, is untenable for the following reasons.

5.4 Upon perusal of the finding of the learned arbitrator in respect of this claim, it is noted that expenses which the respondent sought to claim towards higher charges were rejected on the ground that there was no

documentary evidence.

5.5 In respect of claims for engaging the personnel, such as, Site Engineers, Store Keeper and Chaukidars, an adhoc sum of Rs.8,000/- was awarded which was reduced to 40% i.e., Rs.3,200/-. Taking into account the period of prolongation which was 42 months, a sum of Rs.1,34,400/- was awarded.

5.6 In addition, a sum of Rs.84,000/- was also awarded towards running expenditure qua the school building. The sum of Rs.84,000/- was arrived at by once again taking an adhoc figure of Rs.5,000/- p.m. which was reduced by 40%; the net figure of Rs.2,000/- p.m. was then multiplied by the period involved, which is 40 months. Considerably, an error occurred as when Rs.2,000/- p.m. would be multiplied by 40 months, the total sum would come to Rs.80,000/- and not Rs.84,000/-, as noted in the award. This according to me, is the only error.

5.7 The submission of Mr. Dass that there is nothing placed on record with regard to the said staff and Engineers being positioned at site, in my view, in such like cases, the arbitrator has to go by his experience. The arbitrator in this case is a qualified Civil engineer and is a retired Director General of CPWD. The observation of the Supreme Court in the case of ***Municipal Corporation of Delhi vs Jagan Nath Ashok Kumar & Anr. (1987) 4 SCC 497*** being apposite are extracted hereinafter :-

“....5. It is familiar learning but requires emphasis that section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B. Mukharji, J. as the learned Chief Justice then was, expressed the above view in *Haji Ebrahim Kassam Cochinwall v. Nothern Indian oil Industries Ltd., A.I.R. 1951 Calcutta 230* and we are of the

opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J. in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd.*, [1948] 2 All E.R. 186 observed at pages 188/189 of the report as follows:

"A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold Awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an Arbitrator has acted within the terms of his submission and has not violated any rules of what is so often. called natural justice the Courts should be slow indeed to set aside his award."

(emphasis is mine)

6. This in our opinion is an appropriate attitude...."

6. I find the amount awarded by the arbitrator neither excessive nor unreasonable. Therefore, I do not intend to interfere with the same.

7. This leaves me with the last claim, which is claim no.18. In order to appreciate the objection qua this claim, one would have to refer to relevant extracts of the contract, which in the particular case is clause 29(1).

“..Clause 29(1). Without and Lien in respect of sums claimed – Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the contractor, the Engineer-in-Charge of the Corporation shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any deposited by the contractor and for the purpose aforesaid, the Engineer-in-Charge or the Corporation shall be entitled to withhold the security deposit, if any, furnished as the case may be and also have lien over the same pending finalisation or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the Engineer-in-Charge or the Corporation shall be entitled to withhold and have a line to retain to the extent of such claimed amount or amounts referred to above, from any sum or sums found payable or which at any time thereafter may become payable to the Contractor under the same or any other contract, with the Engineer-in-Charge or the Corporation or any contracting person through the Engineer-in-Charge pending, finalisation or adjudication of any such claim.

It is an agreed term of the contract the same money or moneys so withheld or retained under the lien referred to above, by Engineer-in-Charge or Corporation will be kept withheld or retained as such by the Engineer-in-Charge or Corporation till the claim arising out contract governed by as such by the Engineer-in-Charge or Corporation till the claim arising out of or under the contract is determined by the arbitrator (in the contract governed by the arbitration clause) by the competent court, as the case may be and that the

contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to above and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company. The Engineer-in-Charge or Corporation shall be entitled to withhold and also have lien to retain towards such claimed or amounts in whole or in part from any sum found payable to any partner / limited company as the case may be, whether in his individual capacity or otherwise...”

7.1 A perusal of the clause would show that there is a prohibition on award of interest. This aspect of the matter is covered by the judgment in NBCC’s own case to which reference has been hereinabove.

7.2 Furthermore, the Supreme Court in the case of *Sayeed Ahmed and Co. Vs. State of U.P., 2009 (12) SCC 26 and Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), Palghat and Ors., 2010 (8) SCC 767* has enunciated the principle that where contracts prohibit grant of interest, the arbitrator cannot grant interest in exercise of power contained under Section 31 (7) (a) of the contract. A bare reading of the Section would show that the arbitrator can award interest from the date of cause of action till the date of the award, only if, parties do not agree to the contrary. In this case, provisions of the contract show that the parties have agreed to the contrary. Since there is a prohibition on grant of interest, obviously no compound interest could not have been granted. In any case, the arbitrator has no power under Section 31(7) of the Act to grant compound interest. If compounding of interest is to be ordered by the arbitrator such power should be embedded in the contract. [See *State of Haryana and Ors. Vs. S.L. Arora & Company, (2010) 3 SCC 690*].

8. For the reasons given above, the petition is allowed to the extent it awards claim no.18 in favour of the respondent. Claim no.8 is rejected. Claim no.12, is partially allowed to the extent of adjustment of Rs.4,000/- as indicated above. Therefore, against a total sum of Rs.2,18,400/-, the respondent will receive a sum of Rs.2,14,400/-. The petition is accordingly disposed of.

8.1. Needless to say, the respondent will be entitled to interest at the rate of 10% p.a. as awarded by the arbitrator from the date of the award till the date of payment.

RAJIV SHAKDHER, J

NOVEMBER 20, 2014

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