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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgement delivered on: 27.10.2014

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O.M.P. 1279/2014

ORIENTAL PATHWAYS (NAGPUR) PVT. LTD. Petitioner

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA Respondent

Advocates who appeared in this case:

For the petitioner: Mr Anil Airi, Ms Sadhana Sharma & Ms Rani Chandana, Advs.

For the respondent: Nemo

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

OMP No. 1279/2014 & IA Nos. 20676/2014 (Condonation of delay in filing), 20677/2014 (Exemption) & 20678/2014 (condonation of delay in re-filing)

1. This is a petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the Act). By this petition, admittedly, challenge has been laid to the award dated 19.05.2014 only qua dispute number 1. Dispute no.1 pertained to a claim made by the petitioner herein with regard to “uncompensated material cost” which arose, according to it, on account of force majeure conditions. I must note that, I was informed by the learned counsel for the petitioner that the respondent herein has also

assailed the very same award, i.e., award dated 19.05.2014, by way of a petition filed under Section 34 of the Act.

2. Therefore, for adjudication of this petition, the following brief facts are required to be noticed:

2.1 The petitioner is an incorporated company promoted by two companies comprising of Oriental Structural Engineering Pvt. Ltd. and Delhi Brass and Metal Works Pvt. Ltd. The petitioner being an incorporated consortium of the aforementioned two companies, made a bid in respect of the following works, qua which a tender was issued by the respondent: “Improvement, Operation and Maintenance including Strengthening and Widening of existing 23 lane road to 4 lane Road dual carriage way from Km 50.000 to Km 100.00 of NH 6 (Kondhali – Talegaon Section) in the State of Maharashtra on BOT basis” (hereinafter referred to as the work in issue).

2.2 The petitioner was declared successful and, accordingly, a concession agreement was executed as between the parties herein, on 10.03.2006.

2.3 It appears that during the execution of the contract itself, disputes arose between the parties herein, one of which pertained to “uncompensated material cost”. Since disputes could not be amicably settled, recourse was taken to arbitration mechanism in accordance with clause 39.2 of the concession agreement read with amendments carried out thereto vide supplementary agreement dated 02.12.2009. The disputes were referred to a three-member arbitral tribunal and, as noted above, award was published on 19.05.2014.

2.4 It would be relevant to note that in so far as dispute no.1 was concerned, an amendment application was filed under Section 23(3) of the Act. By this application, an alternate prayer was sought to be incorporated.

The arbitral tribunal vide its order dated 24.07.2012 allowed the said application.

2.5 Consequently, the parties were allowed to amend their respective pleadings, which were taken on record by the arbitral tribunal. Briefly, the amendment sought was that, instead of extending the period of concession on account of force majeure conditions obtaining in the matter, the petitioner be compensated in pecuniary terms.

3. In this background, it was argued by Mr Airi, learned counsel for the petitioner, that the impugned award was flawed to the extent it rejected its claim, essentially, for compensation towards costs incurred with respect to the unprecedented price escalation in the rates of key construction materials, such as, cement, steel, bitumen etc.

3.1 It was contended by learned counsel for the petitioner that the petitioner had benchmarked the increase in material costs to the Wholesale Price Index (in short WPI), and that, it was assumed, at the stage when the bid was filed, that the cost would increase at an average rate of 5% per annum during the construction period.

3.2 Mr Airi submitted that much to the surprise of the petitioner, the variation/ escalation in price, of key construction materials, was much more than that which was anticipated. It was the learned counsel's contention that the increase of price qua each of the key component was in the following range, between periods, indicated below:

- (i) the increase in the price of cement varied between 42% to 57%, during April 2006 and March 2008;
- (ii) the increase in the price of steel varied between 10% to 77%, during May 2006 and March 2008;
- (iii) the increase in the price of bitumen varied between 82% to 110%,

during October 2006 and March 2008;

(iv) the increase in the price of bitumen-CRMB-60 varied between 53% to 63%, during October 2007 and March 2008; and

(v) the increase in the price of emulsion varied between 49% to 60%, during December 2006 and March 2008.

3.3 Mr Airi submitted that in almost all Engineering Procurement Contracts (in short E.P.C), unlike the concession agreements, which is what the present contract is about, the escalation in cost, i.e., price adjustment, is invariably benchmarked in relation to WPI. In the present concession agreement, which is in sum a Build, Operate and Transfer contract (in short B.O.T), there is no price adjustment provision, and hence, for the purposes of claiming compensation for such unprecedented increase in material costs, recourse will necessarily have to be taken to the force majeure clause, which is, contained in clause 29 of the concession agreement. According to Mr Airi, the arbitral tribunal failed to appropriately apply the provisions of clause 29 of the concession agreement.

3.4 It is in this background, Mr Airi submitted that the petitioner, as indicated above, had benchmarked the increase in material cost at the rate of 5% per annum based on the past WPI trends in that behalf. It was the learned counsel's contention that in so far as quantum of claim for unprecedented increase in material cost was concerned, the same stood confirmed by the respondent. For this purpose reference was made to letter dated 26.03.2012 (Ex. RD-17) and proceeding of the arbitral tribunal held on 5th and 6th April, 2012.

4. I have heard the learned counsel for the petitioner. What essentially emerges on perusal of the record and submissions made by the counsel are that the petitioner ought to have been compensated by the respondent by

allowing it to take recourse to clause 29 of the concession agreement, which, admittedly, represents force majeure conditions.

4.1 Before I proceed further, one would have to bear in mind that the petitioner for the first time made a claim for compensation in the wake of unprecedented escalation of cost of key construction materials only on 03.12.2008, after the provisional completion date had been crossed. The provisional completion date was 18.03.2008.

4.2 Be that as it may, the petitioner had quantified the dispute in monetary terms, along with interest, at Rs. 23 crores. The claim, admittedly, was made in terms of clause 29 of the concession agreement.

5. Therefore, what has to be examined by me, as to whether the reasoning given by the arbitral tribunal is based on material placed before it and/or whether or not it is infused with any patent error of law or passed in breach of public policy or is contrary to the express terms of the contract.

5.1 Clause 29.1 of the concession agreement defines a force majeure event as an act or event which is: (i) beyond the reasonable control and not arising out of the fault of the Affected Party, (ii) the Affected Party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sums of money and (iii) has a Material adverse Effect on the Project.

5.2 Clause 29.2 of the concession agreement defines non-political force majeure event (which, admittedly, is the case arising in the present context), in several sub-clauses. What is relevant though, for our purposes is sub-clause (i). The said sub-clause (i) of clause 29.2 is extracted hereinbelow for the sake of convenience:

“.....29.2 Non-Political Force Majeure Events: For purposes

of Clause 29.1 Non-Political Events shall mean one or more of the following acts of events:

(i) acts of God or events beyond the reasonable control of the Affected Party which could not reasonably have been expected to occur, exceptionally adverse weather conditions, lightening, earthquake, cyclone, flood, volcanic eruption of fire (to the extent originating from a source external to the Site or beyond design specifications for the construction works) or landslide....”

5.3 The petitioner, both before me as well as the arbitral tribunal, based on the aforesaid sub-clause (i) of clause 29.2 has argued that its case falls within the expression of “*events beyond the reasonable control of affected party, which could not reasonably have been expected, occurred*”. As is clear upon a bare reading of sub-clause (i) of clause 29.2 that very same clause also sets out certain specific events as force majeure events, such as, exceptionally adverse weather conditions, lightning, earthquake, cyclone, flood, volcanic eruption or fire (to the extent originating from source external to the site or beyond designs specifications for the construction work or land slide). Therefore, in my opinion, the said expression, on which reliance is placed on by the counsel for the petitioner, would have to take colour from events which have been adverted to above.

5.4 Notwithstanding the above, it is clear from a conjoint reading of clause 29.1 and 29.2 of the concession agreement, that the event over which the affected party has no reasonable control, which it could not have reasonably expected occurrence of, should in fact impede the performance of obligations, under the concession agreement, by such affected party.

5.5 Admittedly, in the present case, obligations have been discharged by the petitioner. The petitioner seeks to claim compensation for what it terms as unprecedented price rise via the force majeure clause. A force majeure

clause, in the context of Indian law, is reflective of the provisions of Section 56 of the Indian Contract Act, 1872 (in short the Contract Act). It is a provision which discharges the affected party from its obligations to perform the contract on the ground that the act, which the affected party was obliged to undertake, has become impossible, or by reason of some event, the performance has become impossible.

5.6 What has to be borne in mind, is that, the impossibility of performance is not the same, as difficulty, in discharging obligations undertaken under the contract by a party, but is one, which brings about a fundamental change in performance than that which was originally contemplated. Therefore, the change in circumstances, should be so fundamental, that they strike at the very heart of the contract. In addressing itself to this aspect, the court, would thus have to evaluate the terms of the contract, the surrounding circumstances and the intention of the parties, so as to ascertain, as to whether the altered circumstances completely dissolve the object which was sought to be achieved by the contract. [See *Satyabrata Ghose vs Mugneeram Bangur & Co. (1954) SCR 310*].

5.7 What surely does not, in my opinion, fall within the ambit of the doctrine of frustration, as encapsulated in Section 56 of the Contract Act, is a situation or a circumstance by which the performance of the contract merely becomes more onerous or burdensome. The relevant observations made in this behalf in the judgement of the Supreme Court in the case of *Alopi Parshad & Sons Ltd. vs Union of India AIR 1960 SC 588*, being apposite, are extracted below:

“....20. ...Mr. Chatterjee, on behalf of the Agents, submitted that the circumstances existing at the time when the terms of the contract were settled, were "entirely displaced" by reason of the commencement of hostilities in the Second World War,

and the terms of the contract agreed upon in the light of circumstances existing in May, 1937, could not, in view of the turn of events which were never in the contemplation of the parties, remain binding upon the Agents. This argument is untrue in fact and unsupportable in law. The contract was modified on June 20, 1942, by mutual consent, and the modification was made nearly three years after the commencement of the hostilities. The Agents were fully aware of the altered circumstances at the date when the modified schedule for payment of overhead charges, contingencies and buying remuneration, was agreed upon. Again, a contract is not frustrated merely because the circumstances in which the contract was made, are altered.

21. Section 56 of the Indian Contract Act provides:

" A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promiser could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

Performance of the contract had not become impossible or unlawful; the contract was in fact performed by the Agents, and they have received remuneration expressly stipulated to be paid therein. The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity.

"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate--a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to

be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point-not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the court reaches a conclusion which is 'just and reasonable' (Lord Wright in *Constantine's case*(1) or one 'which justice demands' (Lord Sumner in *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* (2) this result is arrived at by putting a just construction upon the contract in accordance with an 'implication..... from the (1) (1942) A.C. 154, 186. (2) (1926) A.C. 497, 510 presumed common intention of the parties'-speech of Lord Simon in *British Movietonews Ltd. v. London and District Cinemas Ltd.* [L.R. 1952 A.C. 166].

22. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an un contemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had as contended by Mr. Chatterjee, relying upon which a party may ignore the express covenants on account of an un contemplated turn of events since the date of the contract.....

.....In India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into, will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. *Parkinson and Co. Ltd. v. Commissioners of Works* (1) was a case in which on the true interpretation of a contract, it was held, though it was not so expressly provided, that the profits of a private contractor, who had entered into a contract with the Commissioners of

Works to make certain building constructions and such other additional constructions as may be demanded by the latter, were restricted to a fixed amount only if the additional quantity of work did not substantially exceed in value a specified sum. The Court in that case held that a term must be implied in the contract that the Commissioners should not be entitled to require work materially in excess of the specified sum. In that case, the Court did not proceed upon any such general principle as was assumed by Denning, L.J., in the *British Movietonews Ltd. v. London and District Cinemas Ltd.* (2).

23. We are, therefore, unable to agree with the contention of Mr. Chatterjee that the arbitrators, were justified in ignoring the express terms of the contract prescribing remuneration payable to the Agents, and in proceeding upon the basis of quantum meruit.....”

[Also see, *Naihati Jute Mills Ltd. vs Khyaliram Jagannath* (1968) 1 SCR 821, *Continental Construction Co. Ltd. vs State of Madhya Pradesh* (1988) 3 SCC 82 and *Oil & Natural Gas Corporation Ltd. vs Saw Pipes Ltd.* (2003) 5 SCC 705)].

6. In the present case, in sum, what has been argued before me by Mr Airi is that, the stated unprecedented increase in price brought the petitioner’s case, within the force majeure clause. In my view, this submission is untenable. The reason for the same is that, the stated unprecedented increase in price did not frustrate the performance of the contract. In this context, the petitioner’s obvious response would be, which is also what was portrayed before me, that instead of impacting the interest of the respondent by not continuing with the discharge of its obligations under the contract, it chose to lodge a claim thereafter for compensation. To my mind, this by itself would be an indicator that increase in price was not

expropriatory, it was perhaps onerous or burdensome or even I may say irksome; it certainly did not bring about a fundamental change in circumstances.

7. There is another aspect of the matter which is not disputed by the learned counsel for the petitioner before me, which is that, in terms of clause 29.6(b) of the concession agreement, if the respondent were to come to a conclusion that a force majeure event had occurred, then the concession period (as provided under the concession agreement), would have to be extended by such a time span for which the force majeure event continued to subsist. In the context of the present case, it is clear, if this argument of the petitioner were to be accepted, it would have become well nigh impossible to grant relief in terms of clause 29.6(b) of the concession agreement to the petitioner. The price increase, even according to the petitioner, for various key construction materials had not only different ranges (in percentage terms), but would necessarily have different value components, when examined in relation to the total value of the contract. The respondent would find it not only difficult, but perhaps impossible, to calculate the period by which concession agreement ought to be increased. The mere timelines, during which the price rise took place for various key components, would not suffice. It is precisely, for this reason that the petitioner filed, an application for amendment seeking monetary compensation; albeit as an alternate relief. This, of course, is not contemplated in clause 29 of the concession agreement, and thus, in actuality, the alternate relief sought by the petitioner, in effect, was offered as a sop to get over the difficulty faced by it in seeking relief in terms of clause 29 of the concession agreement.

8. The arbitral tribunal has, in my opinion, come to the correct

conclusion based on the provisions of the Contract Act, and therefore, I am not inclined to interfere with the award at the behest of the petitioner. There is, to my mind, no breach of public policy either. A possible challenge on this ground is set out in Section 34(2)(b)(ii) of the Act. In defining, what public policy would mean, the Supreme Court in the case of *Oil & Natural Gas Corporation Ltd. vs Saw Pipes Ltd.* has preferred to give it a wider meaning thereby bringing within its ambit, amongst others, patent illegalities committed by the arbitrator. One such illegality would stand committed, if an arbitrator were to stray outside the terms of the contract, which is clearly prohibited under Section 28(3) of the Act. [See specific observations of the Supreme Court in paragraphs 16 to 31 and 55 of the said judgement.]

8.1 In this particular case, the arbitrators have adhered to the terms of the contract, as noted above. Had the arbitral tribunal accepted the plea of the petitioner, it could have resulted in patent illegality, rendering it assailable by the respondent.

9. The petition is, accordingly, dismissed. The pending applications are, consequently, disposed of.

RAJIV SHAKDHER, J

OCTOBER 27, 2014

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