

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

+ **FAO No. 263/2016**

% **17th August, 2017**

M/S BRIJ LAL & SONS Appellant

Through: Petitioner in person

Tilak Raj Gogia

versus

UNION OF INDIA Respondent

Through: Ms.Palak Rohmetra, Adv. for
Mr.Sanjay Dewan, Advocate
for R-1.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') challenging the order of the court below dated 05.03.2016 by which the objections filed by the appellant under Section 34 of the Act have been dismissed for setting aside the Award of the Arbitrator dated 06.09.2010.

2. Before advertng to the facts in detail, I would like to mention that the contract in this case is of the year 1999 and today we

are in the year 2017. The matter is roughly about 18 years old. There were earlier Awards which were set aside and the matter was remanded back to the Arbitrator and ultimately the Award which is now challenged is the Award dated 06.09.2010. In the arbitration proceedings, the appellant/claimant raised total six claims as under:-

- “Claim No.1: The claimant has claimed an amount of Rs.1,75,829.44 on account of work done but neither recorded nor payment made.
- Claim No.2: Damages due to idle labour sitting in mini-pant machinery watch and ward as well as the raw materials at the site – Rs.5,00,000/-.
- Claim No.3: 10% loss of profit per month from the date of occurrence to the date of payment to the work done as well as on further amount loss of profit due to the stoppage of work – Rs.1,75,829.44
- Claim No.4: The default of payment after the stipulated date completion, i.e. 21.05.1999 – Rs.87,000/-.
- Claim No.5: 18% p.a. interest from the date of occurrence to the date of payment.
- Claim No.6: The cost of proceedings in the Court as well as in the Arbitration proceedings – Rs.10,000/-.”

3. Out of the aforesaid claims, claim no.1 has already been allowed for a sum of Rs.1,24,639/- and which awarded amount along with interest at 10% has already been received by the appellant/claimant. Appellant however is seeking allowing of the balance portion of claim no.1.

4. Disputes arose between the parties with respect to the work awarded to the appellant/claimant of Extra Ordinary Repair

(EOR) to Police Colony at Defence Colony, New Delhi of pre-mix carpeting on the Service Road leveling and dressing of beams. The period of completion of contract in question was from 22.03.1999 to 21.05.1999.

5. By the impugned Award the Arbitrator has arrived at a finding that though the period of start and completion of work was from 22.03.1999 to 21.05.1999, the appellant however started the work only as late as on 11.05.1999. The appellant was asked to stop the work because work could not be commenced without getting the material of the work inspected and that the material was required to be used as per the necessary specifications, but, the appellant had continued to work. The Arbitrator observed that the appellant being the registered contractor with the respondent was well aware of the procedure and therefore, it could not have started the work without measuring of the work to be done. In spite of objections of the concerned AE, the appellant continued with the work. The Arbitrator also records that the appellant refused to produce the cash memo with respect to the material purchased and even intimated that bricks could not be brought as the place where the flooring is to be done has not

been shown. The Arbitrator then records that in spite of the appellant stating that bricks cannot be brought because the place where the flooring is to be done has not been shown, appellant subsequently did work of flooring without getting the bricks tested and inspected. Arbitrator also notes that in spite of the work being again stopped by the respondent, still the appellant continued. The Arbitrator further holds that the respondent had the right to reject the work in view of the test result obtained from the designated testing laboratory that the material had failed and respondent was not bound to get the material re-tested from some other independent labs as requested by the appellant. It is seen that ultimately the issue boils down to the amount of work done by the appellant and whether the work done more as stated by the appellant or was as found in the report of the Local Commissioner who gave his report dated 21.04.2003.

6. The relevant portion of the Award giving relevant findings against the appellant reads as under:-

“1.1 Findings of arbitrator and award:

It is observed that the claimants had although challenged the award dated 22.12.2007 published by the then Arbitrator Shri A.K. Singhal but accepted the amount of award along with up to date interest as admitted by them during the proceeding held on 21.06.2010. In their letter dated 01.07.2010 the claimants submitted that the amount of claim No. 1 awarded and accepted by them should not be considered by the Arbitrator while giving

the fresh award as they had already spent more amount in litigation. During the oral hearing held on 21.06.2010 and 14.07.2010, they also pointed out that the Ld. Arbitrator Shri A.K. Singhal had omitted certain measurement pointed out by the Local Commissioner, wrongly reduce the agreement rates, not considered any payment against the hidden item of pot holes, dressing of surface and the disposal of earth for brick Kharanja.

It is observed that stipulated date of start and completion were 22.03.1999 and 21.05.1999 respectively and as per clause 5 of agreement the time was essence of contract. However, the claimants for the first time informed the respondents in writing vide letter dated 10.05.1999 (C-3) contending that they could not take up the work due to non-availability of regular AE and EE being out of station up to 06.05.1999 while their mini plant and labour were ready to start the work on 07.05.1999 which was sitting idle till that day, however, AE and JE has refused to record the ground level of all the area so that pot holes quantities can be measured after deducting the thickness of pre mix carpeting and also intimated the respondents that they shall start the work on 11.05.1999 to save their idle labour as well hire charges of plant.

This letter was received in respondents EE's office on 11.05.1999 at 11.00 AM as per the diary receipt on (C-3). It is also observed from letter dated 11.05.1999 of AE concern address to the claimants (Annexure A-1 along with site order book instruction (dated 10.05.1999 of JE and dated 11.05.1999 of AE) and reply given by the claimants vide letter dated 13.05.1999 (C-20) that site was inspected jointly by the claimants and JE and AE of the respondents on 11.05.1999 at 4.45 PM and the claimants were directed to bring sufficient quantities of building materials required for work at least for a fortnight, to submit the cash memo of bitumen purchased, to stack the stone aggregate, to make immediate arrangement for sending the sample of coarse aggregate and bitumen for testing and to bring the bricks immediately so that the same may be tested before use. From the reply given by the claimants vide C-20 it is apparent that they had requested the AE only on 11.05.1999 at 11.10 AM to visit the site for recording the measurement before starting the work. Although the claimants submitted that instructions were not got noted by them through site order book, which was not produced by site staff even on their demand as they themselves were interested to right on the Site Order Book on their own during the inspection at 4.45 PM on 10.05.1999. However, the claimants had not denied that these instructions were given to them during the site inspection on 10.05.1999 while replying to the observation communicated through copy of site order book enclosed in letter dated 11.05.1999 of AE. While replying the observation of AE, the claimants refused to produce cash memo and also alleged that AE himself was not interest in sending the sample. They also intimated that the bricks cannot be brought as the place where the flooring is to be done has not been shown to them and also intimated that since the work was stopped by AE, in their absence at 2.15 PM on

11.05.1999. They have lost Rs. 20,000/- on account of labour wages, hire charges of mini plant, road-roller, tanki or bitumen, wastage of kerosene oil diesel, etc. and demanded to pay the same. They also requested the respondents as follows in the concluding para of this letter dated 13.05.1999 (C-20):

“Hoping that you may record the ground level of the pre-mix work where it is to be done and also record the stone aggregate, stacks as well as the bitumen on 14.05.1999 at 10.30AM. Otherwise it seems that the department is not interest to record but I shall not stop the work due to police, the Addl. SHO instructed me to complete the job at once to avoid hindrances their jobs. I wish to state that you will be held liable to all the consequences, damages, etc. or your order in writing to stop the work. Kindly make the R.A. Bill within three days otherwise the department will have to suffer damages per month on this account.”

From the above it is apparent that the claimants never intimated the respondents after bringing the material to take sample of the same and send the same for testing before actually taking up the work. And when during the site inspection on 10.05.1999, they become aware that without testing of material they shall not be allowed to work, they had written said letter dated 10.05.1999 (C-3) which was delivered to the respondents on 11.05.1999 at 11.00 AM. Further from their letter dated 13.05.1999 (C-20), it is also apparent that they had requested AE only on 11.05.1999 after 11.00 AM to visit the site for recording pre-measurement. The respondents requested for giving the cash memo of purchase of bitumen and arrangement for sending the sample were very genuine under the agreement so as to ascertain the source of such bitumen procured for its genuineness and to check the quality of material. The claimants are registered contractor of the respondents departments and are well aware that under the agreement all the building materials are required to be tested for its standard and specification as per direction of Engineer-in-Charge and pre-measurements are necessary for the hidden work of pot holes etc. As per clause 6 of agreement the claimants were required to give at least 7 days notice to the respondents for taking up the measurement of such work, but from the correspondence as discussed above, it is apparent that the claimants did not allowed the respondents, the testing of material by not making arrangement for sending such material for testing and did not give sufficient time for taking pre-measurement and started the work on 11.05.1999 itself which was reportedly stopped by the respondents at 2.15 pm on 11.05.1999, however, the claimants had again started the work without completing the formalities as requested by the respondents EE, however, the work was again stopped by the respondents on 14.05.1999 (Claimant's letter dated 13.05.1999 C-20 and dated 01.07.1999 C-8) as admitted by the claimants during oral hearing held on 14.07.2010 that they had executed all the work between 11.05.199 to 14.05.1999 upto 12.00 Noon, when their work was stopped by the respondents. The claimants vide letter dated 13.05.1999 – C-20) had also

intimated the respondents AE that they shall not stop the work on account of said instructions of Police/SHO to them to complete the work at once.

It is also observed that ultimately the material got tested from the designated testing laboratory of PWD, however, the same was failed and after that the claimants requested the respondents to get the same tested again through some other independent labs.

It is also observed that although the claimants refused to bring the brick for testing on the ground that no location has been given to them for brick flooring (C-20) but they had executed the work of brick flooring for 210.61 sqm. (as apparent from the L.C. report and award dated 22.12.2003 of the Ld.Arbitrator Shri A.K.Singhal).

In fact the respondents are pay master and as per agreement the claimants were to execute the work as per the direction of Engineer-in-Charge. **From the above it is apparent that the claimants did not give reasonable chance to get the material tested for its specification and did not give reasonable notice for pre-measurement and started the work of on their own against the instruction of the respondents and when their work was stopped by the respondents before issue of claimants letter dated 13.05.1999 (C-20) they again started the work on the pretext of said instruction from the Police against the direction of the respondents, which had to be again stopped by the respondents on 14.05.1999 as admitted by the claimants. Under the circumstances, I hold that the respondents were having every right to reject the work done by the claimants under such circumstances and in view of test result obtained from the designated laboratory of PWD.** The respondents were also not bound to get the material re-tested from some other independent labs as requested by the claimants after the said material did not pass the standard in PWD Lab maintain by separate division. However, it is observed that ultimately the work done by the claimants had been accepted by the respondents as it is without getting the same redone at the risk and cost of the claimants **and the award published by the then Ld.Arbitrator Shri A.K.Singhal against this claim has already been accepted by the respondents and payment has been made by them accordingly for Rs.1,24,638/- against this claim.** Regarding the left out measurement as indicated in Local Commissioner report dated 21.04.2003, I agree with the respondents argument that the remaining work was not within the scope of agreement and as the work was to be executed within the limits of Police Colony only as per scope of work and they are not obliged to accept and pay for the work, if executed by the claimants on their own or as per the direction of Police/Client Department without any specific direction of the respondents EE who had awarded the work to the claimants. The claimants failed to establish with documentary evidences if they were directed to execute the work beyond the gate of colony also by the respondents EE or his site representatives JE of AE. **Further the then Ld. Arbitrator was within his right to decide the rate of reduction on account of said sub-**

standard work executed by the claimants. I also hold that the rate decided by the then arbitrator are very reasonable and no modification in rate granted by then Ld.Arbitrator is required.

Thus in view of overall circumstances I also agree that amount of Rs.1,24,639/- arrived at by the then arbitrator Shri A.K.Singhal after considering the report of the Local Commissioner is quite reasonable, as such, I also hold that the claimants are entitled only as Rs.1,24,639/- against this claim and I, therefore, award Rs.1,24,639/- to the claimant against claim No.1.

There is no substances or justification in the claimant's request that as they have already spent much more amount in legal expenses as such the amount already awarded and paid to them against this claim should not be considered as such I hold that no further amount is to be paid to the claimants against claim No.1 over and above already paid to them as per the award of the then arbitrator, Shri A.K. Singhal.

Claim No.2: Damages due to idle labour sitting in mini-pant machinery watch and ward as well as the raw materials at the site – Rs.5,00,000/-.

AND

Claim No.3: 10% loss of profit per month from the date of occurrence to the date of payment to the work done as well as on further amount loss of profit due to the stoppage of work – Rs.1,75,829.44

AND

Claim No.4: The default of payment after the stipulated date completion, i.e. 21.05.1999 – Rs.87,000/-.

2.1 Findings of arbitrator and award:

As already held under para 1.1 that the claimants were required to bring the required material, and got its approval from the respondents (after its lab testing if so desired by Engineer-in-Charge) and only after they were required to make further arrangement of labour and machinery to execute the work, which the claimants did not do and started the work against the instructions of the respondents, as such the respondents were entitled to stop the work which they did on 11.05.1999 and again on 14.05.1999. Under the circumstances, I hold that the claimants are not entitled for above claims and I award 'NIL' amount to the claimants against their claim No.2, claim no.3 and claim no.4 all.” (emphasis added)

7. The law with respect to deciding of objections under Section 34 of the Act is now well settled. Once the Arbitrator gives reasons, and thus Arbitrator takes one possible and plausible view from the material on record, then the court hearing objections under

Section 34 of the Act has no power to interfere with the Award because the Award can only be interfered with if it is against the contract between the parties or is against the law of the land or is so completely perverse that the court feels obliged to interfere with the same on the ground of public policy. I have reproduced the relevant paras of the Award and also given the conclusions by the Arbitrator including of work which was to be commenced from 22.03.1999 and completed on 21.05.1999 was only started on 11.05.1999, and that also without measurement being done of which the appellant was well aware being a registered contractor. Also the appellant inspite of being asked to stop the work, it still continued. Appellant was found to be doing the work without the materials being used in the work being tested and the contention of the appellant is not being believed that the JE was not available for measurement of the work. Obviously, the non-execution of work period from 22.03.1999 till 11.5.1999 and when the work was to be completed on 21.05.1999, is a long period of deliberate inaction by the appellant and therefore the appellant, cannot lay any blame at the door of the respondent once appropriate reasoning has been given by the Arbitrator for allowing the claim of

the appellant/claimant only partially. Also, the Arbitrator has discussed the report of the Local Commissioner and accepted the same with respect to the work done and therefore, the appellant cannot argue that the Arbitrator has not discussed the report of the Local Commissioner. The report of the Local Commissioner is referred to in the paras of the Award which have been reproduced hereinabove. The Arbitrator has also rightly held that whatever work was done by the appellant, as per its value, (including defective work) was duly paid and there was not required change in the value of the work done as was assessed as per the earlier Award and as per the report of the Local Commissioner and test lab results.

8. In view of the above, I do not find any merit in the appeal and it is found that the appellant is unnecessarily indulging in the litigation with respect to a contract which is of vintage 1999. This appeal is dismissed with costs of Rs.20,000/- which costs shall be recovered by the respondent in accordance with the law.

AUGUST 17, 2017/rb

VALMIKI J. MEHTA, J