

Serial No.1
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Arb.A.No.1/2022

Date of Order: 15.03.2023

North Eastern Electric Power Vs. M/s Om Metal India Ltd. and
Corporation Ltd. (NEEPCO) JSC Ukrhydromech-Joint Venture

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. V.K. Jindal, Sr.Adv with
Mr. V. Kumar, Adv
For the Respondent : Mr. A. Kumar, Sr.Adv with
Mr. S. Saraogi, Adv
Mr. S.D. Upadhaya, Adv
Mrs. A. Synrem, Adv

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes/No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

It is a matter of deep anguish that government bodies tend to mindlessly challenge arbitral awards and the Court is sought to be misled at the appellate stage on matters of fact.

2. The challenge here, in proceedings under Section 37 of the Arbitration and Conciliation Act, 1996, is to the dismissal of a petition questioning the propriety of an arbitral award dated April 23, 2017. It is evident from the award that of the two claims, only the second claim on

account of foreign exchange variation has been allowed. The fundamental premise of the challenge to the award is that the contractor quoted the price of materials in Indian rupees and nothing in the price bid of February 2, 2004 indicated any foreign exchange component therein. In short, the suggestion by the appellant is that since prices had been quoted in Indian rupees and the goods detailed in the bill of quantities were to be locally obtained, there could not have been any claim on account of increased price of the goods supplied as a consequence of the Indian rupee depreciating against the US dollar or the Euro.

3. This fundamental premise is completely flawed and is wholly belied by a certificate issued by the Government of India on May 15, 2006 which indicated that the Kaming Hydro Electric Project (600 MW) was declared as a mega project. Indeed, the arbitrator proceeded on the basis that it was a mega project. The certification of the work as a mega project entailed that no import duty was to be paid on the CIF component of the goods to be supplied. Implicit in this was the recognition that goods had to be imported for the purpose and supplied for the project.

4. That is not the only aberration or the abject falsehood on which the appellant hangs its case. There is more.

5. On April 21, 2004, the contractor addressed two letters to the appellant employer furnishing its alternate price bid. These letters were issued in response to letters written by the employer requiring an alternate

price bid to be submitted in the event the project was certified as a mega project. The clear indication in both the letters dated April 21, 2004 was that steel of various grades of value of Rs.75 crore was to be imported along with further imported components amounting to Euro 2,105,000 equivalent to Rs.12 crore as on the relevant date. There is no dispute of the receipt of such letter. Indeed, as noticed above, the Government of India certified the power project to be a mega project in May, 2006 and the appellant herein was aware that foreign goods worth Rs.87 crore as valued in 2004 were to be supplied by the contractor for the project.

6. In dealing with the claim on account of the foreign exchange variation, the arbitrator noticed the pleadings of the parties and the submission advanced. In such context, paragraph 4.5 of the award is relevant. Such paragraph records the submission on behalf of the claimant-contractor that it had incurred a loss in excess of Rs.7.42 crore because of the devaluation of the Indian rupee and the delay in the execution of the contract and finalisation of design of penstock steel liner which resulted in a rescheduled procurement of steel liner plates from abroad beyond the original contract period. The further submission on behalf of the contractor was that hydraulic cylinders had also to be imported beyond the contract completion date and the falling rupee resulted in the increase in the cost of hydraulic cylinders in excess of Rs.1.31 crore.

7. The award then proceeds to notice that in the letter of April 21, 2004, the contractor had expressly indicated that it would be importing steel components of value of Rs.75 crore and another set of components of value of Rs.12 crore. The arbitrator was satisfied that the two components referred to in the letter dated April 21, 2004 were steel liner plates and hydraulic cylinders.

8. On the merits of the claim, the arbitrator held, at paragraph 5.32 of the award, that the claimant was not responsible for the delay in the completion of the project beyond the stipulated time and that the delay beyond March 2, 2009 “was attributable to the respondent (*the appellant herein*).” The arbitrator then went on to discuss the claim on account of increased costs of the two components – steel plates and hydraulic cylinders – and noticed that the original claim put forth on such account of Rs.9.13 crore was reduced to Rs.8.74 crore. This reduction was due to some of the components having been procured and supplied during the original tenure of the contract by March 2, 2009, for which the contract prohibited the contractor from seeking any additional amount. As for the procurement of the balance quantities of the two components beyond the contemplated period of the contract, the arbitrator did not find any embargo in the contract to disentitle the contractor from seeking such amount.

9. It may do well, in this context, to notice the following lines from the paragraph 5.27 of the award:

“5.27. ... The respondent (*the appellant herein*) at the same time in Paragraph 12 has contended that delay was caused due to magnitude of work, completion of which depends upon various factors, such as, political, natural, geographical etc. and hence, putting the blame, according to the respondent, on it alone for such delay is apparently vindictive in nature and not in keeping with the spirit of the contract. The respondent in the written statement filed did not dispute the contention of the claimant relating to the dates of issuance of PAC, dates of procurement of the materials from abroad, the rate of foreign exchange, the expenditure incurred by the claimant in procuring the materials, which are to be procured from abroad, as well as the amount of loss claimed to have been suffered by the claimant. The contention of the claimant in that regard, therefore, remained uncontroverted.” *(Emphasis supplied)*

10. What is undeniable is that upon going through the records that have been copiously referred to in the award and the submission of the parties in support of their pleadings, the arbitrator came to a conclusion that certain goods were to be supplied by the contractor upon procuring the same from abroad and that even though the contract prohibited additional amounts being sought on any account whatsoever if the supply was made during the contract period, if the supply was made beyond the originally contracted period, the embargo on the price would no longer operate. The arbitrator was satisfied that there was a foreign component which was involved and that the parties were aware of the same, inter alia, as evident from the letters dated April 21, 2004 issued by the contractor to the appellant herein.

11. The appellant has referred to several clauses of the contract, including clause 74 thereof pertaining to price adjustment/variation. There

are three parts to such clause of the contract: the first pertaining to price variation on account of labour, the second dealing with price variation of materials and the third covering fluctuating high-speed diesel prices. In respect of both materials and high-speed diesel, there are formulae devised to ascertain the total change in the contract price; and any price variation, whether to the benefit of the contractor or to the benefit of the employer, would be adjusted by adding a further component to what the contractor was to get or by deducting a component from the contractually agreed price. However, the entirety of clause 74 is governed by the general conditions indicated at the end, including the stipulation that the clause “shall be applicable only for the work that is carried out within the contract period or any extended period attributable to the corporation only.”

12. It is apparent that the arbitrator noticed that there was a mechanism in the matrix contract for price variation in the real sense: both for increase or reduction of price of material. However, clause 74 would be inapplicable for imported material as the formula therein is founded on the change in base price with reference to the wholesale price index or the index in respect of the basket of goods to which the relevant material belonged. In the absence of any specific clause in the contract expressly providing for or prohibiting adjustment on account of currency fluctuation in respect of imported material, the arbitrator was well within his domain to read the contract to imply that either party would be compensated if it

suffered any prejudice due to currency fluctuation for procuring imported goods. Further, in terms of the express stipulation in clause 74 quoted in the immediate previous paragraph, since the extended period of completion of the work was found to be “attributable to the corporation only”, the arbitrator quite unexceptionably reasoned that the principle of price variation recognised in the contract would come into play.

13. According to the appellant herein, clauses 75 and 76 pertaining to currency restrictions and rates of exchange were apparently struck out from the contract as being irrelevant. Such position was accepted by the arbitrator as is evident from the award. There is also no dispute that the contract envisaged that the work would be completed within 51 months of the date of the work order and the parties agree that such time ran out on March 2, 2009.

14. Thus, on the basis of the material available before the arbitrator, particularly the detailed contract and the correspondence exchanged between the parties which were expressly incorporated as part of the contract, it was inescapably evident that there were certain foreign components that were to be procured by the Indo-Ukrainian joint venture contractor; that a substantial part of such procurement was after the contract period was over; and, as a result of this delay and the Indian currency falling against both the US dollar and the Euro, there was considerable increase in the procurement prices for the imported components. Add to this, the fact

that the delay, in this case, of the work not being completed within the stipulated time was solely attributable to the employer, the basis for the second head of claim was established and only the quantum had to be arithmetically ascertained.

15. In view of such findings, particularly the one rendered on facts that the delay was solely attributable to the employer, the arbitrator found the claim on account of additional expenses for procuring the imported components as a consequence of the falling rupee to be justified. The premise and the reasoning are both unquestionable.

16. There is a slight murmur on the part of the appellant that the arbitrator apparently accepted the claim on account of the foreign exchange variation without applying his independent mind to the matter. It may do well, in this context to refer to the quoted paragraph from the award and the recording therein that the employer in this case chose not to deal with the calculations furnished by the contractor for the increased expenses incurred for procuring the foreign components due to currency fluctuations.

17. Once a claim is presented, particularly in adversarial proceedings, it is for the other party to deal with the same in a methodical manner. If there are several factors which go into the making of a claim, each of the factors has to be dealt with individually, unless the principal ground of objection would eliminate the very basis of the claim. Further, if there are several assertions rolled up in a claim, each component has to be

specifically dealt with. In particular, when the basis of a claim is sought to be justified by calculations, as in the present case, unless the calculations are questioned on any reasonable premise, the bare or general denial of the total amount would not pass muster. In this case, the calculations furnished by the contractor did not involve any rocket science or advanced mathematics. The contractor indicated the CIF values of the goods in the foreign currencies paid therefor and the rates of exchange of the foreign currencies qua the Indian rupee on the dates of issuance of the letters of credit as compared to the value of the Indian rupee at the time of making the bid. The CIF prices of the imported goods were matters of record. If the contractor inflated the Indian rupee devaluation against the US dollar or the Euro, the onus to demonstrate such overstated claim was on the appellant herein. The appellant altogether failed to discharge such onus.

18. As a consequence, once the arbitrator found that the basis of the claim was justified, the arbitrator was not required to apply his mind to the quantum of the claim in the absence of any denial in such regard or the remotest of dispute being raised. The only situation where the arbitrator could have looked into the quantum was if it appeared to be palpably absurd or patently erroneous. Since the total value of the foreign components had already been indicated to be to the tune of Rs.87 crore as at the time of furnishing the bid or as at April 21, 2004, the notorious fact that the Indian currency fell sharply in the interregnum was taken into consideration by the

arbitrator to find that the reduced claim of about Rs.8.74 crore due to the foreign exchange variation was not absurd or outlandish.

19. In view of the frivolous nature of the objections to the award fashioned by the appellant in course of the appeal, the respondent was constrained to rely on the original agreement and some of the correspondence exchanged between the parties which were incorporated as a part of the agreement. Ordinarily, in proceedings under Section 34 of the Act of 1996 or in the rarified atmosphere under Section 37 when considering the dismissal of a challenge, the Court is not required to look into the primary documents or even the details of the agreement between the parties. If a plausible view appears to have been taken on the face of the award, the Court does not dig much deeper to seek any justification therefor because of the limited authority that the Court wields in this jurisdiction. Much of the time in this case has been wasted upon the appellant's flawed assertion that there was no foreign exchange component involved since the price bid was made in Indian currency and the contract did not envisage procurement of any component from outside the country.

20. Whether for the fear of vigilance or for other more disagreeable reasons, government bodies are disinclined in accepting awards or acting in accordance therewith. Facile challenges are launched, sometimes based on untenable or tenuous grounds or on erroneous facts as in the present case. Much of court time and the tedium involved in sifting the truth from

the rest in such matters can be avoided if government departments adopt a more rational course of action.

21. There is no basis to the challenge to the arbitral award. The court of the first instance acted in accordance with the letter and spirit of Section 34 of the Act to find no fault with the award. At the end of the day, it must be kept in mind that the Court does not sit in an appeal over an award and the Court is called upon to interfere with an arbitral award only when it sees manifest injustice or something which is obviously opposed to public policy or at blatant variance with the basic tenets of justice as followed in this country.

22. For the appellant's efforts, the appellant will pay a sum of Rs.3 lakh by way of costs in addition to the principal sum awarded and the post-award interest. Such costs should be tendered in three months; in default whereof it shall carry the same rate of interest as in the award.

23. Arb.A.No.1 of 2022 is dismissed as aforesaid.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya

15.03.2023

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