

**HIGH COURT OF TRIPURA
AGARTALA**

Arb. A. 11/2022

The State of Tripura

----Appellant(s)

Versus

Sri Arun Kumar Dey, Contractor

----Respondent(s)

For Appellant (s) : Mr. K. De, Addl. GA

For Respondent(s) : Mr. A. Sengupta, Advocate

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE ARINDAM LODH**

Order

31/01/2024

Heard learned counsel for the appellant and learned counsel for the respondent.

The learned Commercial Court had dismissed the Civil Misc. (Arbitration) 4 of 2020 filed under Section 34 of the Arbitration & Reconciliation Act, by the applicant, appellant herein, affirming the award by the impugned order dated 23.02.2022. The sole dispute between the parties referred for arbitration was regarding reimbursement of the service tax by the employer on completion of the work under Clause 42 and 42.1 of the Agreement dated 16.02.2017. The learned Arbitrator has dealt with the issue in the following manner:

"The Executive engineer also in his turn submitted the written statement to the claims of the contractor. After hearing the parties the only substantial issue that could be framed in the case is *"whether the contractor is entitled to the reimbursement of the Service tax already paid by the contractor in all the running bills."* Basing on the said issue other necessary issues are also framed as follows:

- (1) Whether the Respondent is liable to re-imburement of Rs. 36,64,013.00 to the contractor**
- (2) Whether the contractor is entitled to the 'interest' on the claimed amount of reimbursement if the department is found at fault, if so at what rate.**

ISSUE-(I)

It is evident that the contractor was cautious enough about his duties and liabilities. He wrote letter dt. 15-2-2017 (received by the department on 16-2-17) inviting opinion of the Executive Engineer if he had understood the meaning of Clause-42.1 of the Agreement otherwise than the contractor had understood. No response came forth, thereby indicating that the Executive Engineer did not differ from the ordinary meaning of the clause and was ad-idem with the contractor. In view of that it appears that the Executive Engineer was disputing the 'reimbursement' of service Tax illogically and without any reasons

Now let us look at the language used in the particular clause of the Agreement which reads as

"42. Tax included in the Bid.

The percentage/rate quoted by the contractor shall be deemed to be inclusive of the sales and other levies, duties, royalties, cess, toll tax of central or state government, local bodies and authorities that the contractor will have to pay for the performance of the contract. The employer will perform such duties in in regard to the deduction of such taxes at source as per applicable law.

.....

.....

42.1. Any Central or State sales and other taxes including VAT on completed items of works of this Contract as may be levied and paid by the contractor shall be reimbursed by the Department to the contractor on proof of payment to the extent indicated in Part-II of Schedule-A."

There is no dispute that the contractor paid/deposited the due service tax. There is no dispute either on the amount claimed to have been deposited by the contractor through State Bank of India In addition the contractor has annexed the copies of the vouchers of payment.

The VAT Act or Service tax rules do not payment of tax or in other words it is the exempt the dealer from contractor who is liable to pay the Tax. The Contract clause 42 (quoted above) also confirms it, but here the issue is different. I am to decide whether the contractor after having paid the tax is entitled to be re-imbursed the amount already paid by him.

The word "*re-imburse*" does not invite more than one meaning. The word means "repayment", i.e., "paying back" and has no other meaning Thus here the question is only to examine whether the Service tax connected with the contract work was paid in time and whether reimbursement was demanded by the contractor on production of the proof.

I do not find any dispute on these facts. Yet the contractor has submitted documents in proof of the payment and the demand of the Reimbursement In this backdrop it was the duty of the Executive engineer to immediately arrange paying back the amount which had been paid by the contractor in connection with the construction work. On careful reading of the Clause 42.1 of the agreement I find that the re-imburement is to be made in terms of the Schedule-A Part-11. But I do not find any 'Part-II' of the Schedule-A, and hence I summoned the Executive Engineer to produce the Part-II document as mentioned in the Agreement. Neither he could find it in the Agreement signed by the Parties nor any other document could be produced to prove the existence of "Part-II" of Schedule-A. The Contractor could not explain why he signed the agreement without verifying whether there is any document as Part-II of the Schedule-A.

However, the fault is with the Department which drafted the Agreement, and the contractor cannot be held responsible. The only part, which may be attributed to the contractor is his negligence or lack of observation about the clause-42.1 of the agreement, nothing more. Thus there is no space for the Department to dispute the claim of reimbursement of all taxes on proof of payment on conclusion of the work Truly speaking, the dispute has been raised by non- reimbursement of the claim without any foundation. As the contract Cl.42.1, in the absence of any "Part-II" of Schedule-A binds the department with obligation to pay back the service tax already paid by the contractor, only on production of the proof of payment.

The issue is thus decided in favour of the Claimant contractor.

As discussed above the contractor was negligent about his duties. He signed the agreement without any clarification sought about the clause 42.1, Schedule-A Part-II, I consider that he should not go scott free and a penalty on that score should be imposed. His claim of Rs. 36,64,013.00 should be restricted to Rs 36,00,000.00 only."

Apart from that, the learned Arbitrator has accorded interest @9% from 01.02.2018 till the date of payment since Issue No. (1) relating to reimbursement of service tax dues by the employer was decided in favour of the contractor, service provider. The learned Commercial Court has dealt with the only issue under challenge on grounds of patent illegality in the following manner at paragraph 9 after dealing with the case of the parties and the decisions of the Apex Court on matters pertaining to patent illegality. Para 9 is quoted hereunder:-

"9. The scheme and scope of the provisions of Section 34 of Arbitration Act aims at keeping the supervisory roles of the court at minimum level. The Arbitrator while passing the award had taken reference to the Clause 42 of the NIT and in absence of existence of Part II of price bid has held the fault on the part of the petitioner while drafting the agreement and thereby also

attributed the negligence on the part of the contractor for lack of observation about the clause 42.1 of the agreement. Regard being had to the circumstances the findings and decision so arrived at by the arbitrator cannot be termed as patently illegal within the meaning of sub-section 2A of Section 34 of the Arbitration Act.

As referred to above we cannot sit as an appellate court and to re-appreciate the findings so arrived by the Arbitrator. The contentions so raised on behalf of the petitioner also do not bring the matter within the mischief of any of the grounds as enumerated in Section 34(2) of the Arbitration Act in view of the law as referred to above.

In view of the discussion as we had herein-above I order as follows.”

Learned counsel for the appellant submits that neither the learned Commercial Court nor the learned Arbitrator took into consideration the benefit of exemption which the contractor was entitled to avail under the exemption notification. Though the contractor was entitled for such exemption, but he voluntarily deposited the tax dues and sought its reimbursement. Therefore, the impugned judgment passed by the learned Commercial court is fit to be set-aside and the matter needs be remanded for fresh consideration.

Learned counsel for the respondent has straight away drawn attention of this court to the findings rendered by the learned Arbitrator in the award and also the impugned order passed by the learned Commercial Court.

We have extracted the relevant part of the findings of the learned Arbitrator and the discussions made by the learned Commercial Court on the only issue as regards reimbursement of the service tax dues to the contractor/service provider in terms of Clause 42.1 of the Agreement here-in-above. The parties were bound by the Agreement. Payment of service tax dues on the part of the contractor with the service tax department is not in dispute. Clause 42.1 simply states that the contractor shall be reimbursed by the department on proof of payment to the extent as indicated in Part II of Schedule-A relating to any Central or State Sales and other Taxes including VAT on completed items of work under the contract.

The contractor had submitted documents in proof of the payment which is not in dispute. The decisions of the learned Arbitrator, therefore, were well within the confines of the term of the Agreement. As such, he cannot be said to have committed an error of jurisdiction or wandered outside jurisdiction in deciding claims which did not fall within the terms of the Agreement.

As such following the ratio laid down in the case of *Ssangyong Engg & Construction Co. Ltd. vs. NHAI*, reported in *(2019) 15 SCC 131*, in para 37 to 41 and 69 of the report, we do not find any error in impugned order passed by the learned Commercial Court.

Accordingly, the instant appeal is dismissed.

(ARINDAM LODH),J

(APARESH KUMAR SINGH), CJ



SAIKAT KAR

Digitally signed by SAIKAT KAR
Date: 2024.02.01 15:23:26
+05'30'