

\$~* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. 171/2013

Reserved on: March 17, 2015

Date of decision: April 15, 2015

**NATIONAL BUILDINGS CONSTRUCTION
CORPORATION LTD.**

..... Petitioner

Through: Mr. Manoj Kumar Das, Advocate.

versus

M/S HARJINDER SINGH NAMDHARI

..... Respondent

Through: Mr. Sanjay Bansal, Advocate.

AND

+ O.M.P. 215/2013

M/S HARJINDER SINGH NAMDHARI

..... Petitioner

Through: Mr. Sanjay Bansal, Advocate.

versus

**NATIONAL BUILDING CONSTRUCTION
COMPANY LTD.**

..... Respondent

Through: Mr. Manoj Kumar Das, Advocate.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

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15.04.2015

1. The challenge in these two petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an impugned Award dated 12th November 2012 passed by the learned Arbitrator in the dispute between the

parties arising out of the work for execution of foundation, tower, erection, stringing etc. for 220 KV D/C Jalandhar, Hamirpur Transmission Line Project which was awarded by National Building Construction Corporation Limited ('NBCC') (the Petitioner in O.M.P 171 of 2013) to M/s. Harjinder Singh Namdhari ('the Contractor').

2. In terms of the contract work order dated 26th /29th August 1998, the Contractor was required to execute the foundation, tower erection and stringing work in respect of the following Sections:

A. AMB to Nadaun line Sector -AP 42 to 57

B. Kartarpur to Chauhal line Sector -AP 02 to 27

3. The value of the contract was Rs.46,69,447. It was to be completed within seven months. The starting date was 1st September 1998 and the date of the completion was to be 31st March 1999.

4. According to NBCC, as on 31st March 1999, the Contractor had executed the work for a value of only Rs.19 lakhs. The foundation work was executed only to the extent of 45% and only 60% of the erection work in AMB-Nadaun Section was completed. No stringing work had yet been started. According to NBCC the work could not be completed on account of the

failure of the Contractor to mobilize labour, arrangement of T&P, lack of planning and bad workmanship. According to NBCC, the Contractor, around August 2001 abandoned the work without completing it. The NBCC accordingly encashed the performance bank guarantee ('PBG') and got the work executed at the risk and cost of the Contractor. According to NBCC the Contractor had been paid Rs.63,67,142 and there was no amount due. According to the Contractor, however, the value of the work executed by it was Rs.79,26,677. It is further stated by the Contractor that for the Nadaun section the last date of measurement was 20th October 2000 and for the Kartarpur to Chauhal Section it was 31st December 2000. The last bills for the two sections were the 10th bill dated 23rd October 2000 and the 23rd bill dated 31st December 2000 respectively. There was no further measurement taken or payment made thereafter.

5. It was further contended that the extension was granted by the NBCC without levying any compensation for any delay and further that the work was not terminated by NBCC. According to the Contractor, NBCC failed to provide the site on account of right of way problems, non-payment of crop compensation, failure to carry out the check survey in time and failure to provide the foundation classification, contour plan apart from there being

shortage of steel. It was further alleged that NBCCL had agreed to pay the dewatering charges and increased the rates after the stipulated date of completion and for the quantities exceeding the deviation limit.

6. The Contractor invoked the arbitration clause by sending a legal demand notice dated 7th July 2001. Thereafter, two sole Arbitrators appointed in succession by the NBCC resigned, and the third sole Arbitrator failed to commence proceedings up to 30th April 2006. This Court then directed by order dated 24th April 2007 that another sole Arbitrator be appointed. However, even that sole Arbitrator failed to expeditiously conduct the arbitration. Finally by order dated 26th November 2010, the Court appointed Mr. S.C.Vasudeva as Arbitrator. He proceeded to hear the claims and counter claims of the parties and passed the impugned Award.

7. There were sixteen items of claims filed by the Contractor. Of these the following claims were allowed by the sole Arbitrator by the impugned Award:

- (i) Claim No.2 for release of retention money: Rs.3,94,033.
- (ii) Claim No.3 towards reimbursement of turn over tax: Rs. 1,44,638.

- (iii) Claim No. 4 for release of amount withheld under different RA bills: Rs. 11,250.
- (iv) Claim No.5 revision of rates for extra quantities of work done beyond contractual provisions after 31st March 1999: Rs. 5,73,289.
- (v) Claim No.6 for release of PBG: Rs.4,67,000.
- (vi) Claim No. 9 for charges of idle labour: Rs.1,00,000.
- (vii) Claim No. 15 for simple interest: @9% pa on the amount awarded under Claims 2,3,4 and 6 with effect from 7th July 2001 and Claims 5 and 9 with effect from the date of the Award.

8. As regards the counter claims of NBCC, the following were allowed by the learned Arbitrator.

- (i) Counter Claim No.2 for recovery on account of excess consumption of steel: Rs.1,78,918.
- (ii) Counter Claim No. 3for recovery on account of excess consumption of nuts and bolts, other accessories and earthwires Rs.80,493.
- (iii) Counter Claim No.5 for hire charges of T&P: Rs.50,000.
- (iv) Counter Claim No.8 towards for excess amount spent on testing of materials: Rs.60,000.

9. The learned Arbitrator also awarded the simple interest @9% on the sum awarded against the Counter Claims 2,3,5 and 8 w.e.f. 20th December 2001.

10. The Court has heard the submissions of Mr. Manoj K. Das, learned counsel for the NBCC and Mr. Sanjay Bansal, learned counsel for the Contractor.

11. The challenge by the NBCC to the impugned Award is to the extent of the Contractor's Claim Nos. 5,6 and 9 and the award of interest thereon. It is submitted that Clauses 10 and 28 of the work order stipulated that the rates would remain firm up to the actual date of the completion. There was to be no escalation on whatsoever account till the completion of contract in its entirety. It is submitted that the learned Arbitrator erroneously held that the date of completion in the above context meant 'stipulated date of completion' as per the contract. Further it was submitted that the learned Arbitrator awarded an enhanced rate of 15% above the BOQ rates without any basis.

12. The Court finds that as regards Claim No.5, the Arbitrator has categorically held that NBCC alone could not be held responsible for the

delay. In fact he held that the Contractor was responsible for 30% for delay and NBCC for 70%. This appears to be a pure guess work. Further the Court notices that Clauses 10 and 28 of the work order clearly state that rates are firm till the completion of the work. There was no occasion for the learned Arbitrator to hold that the rates held good only during the stipulated period of completion and not beyond. In *New India Civil Erectors (P) Ltd. v. Oil & Natural Gas Corporation* (1997) 11 SCC 75 in a similar circumstance where the clause in the contract stated that the price was firm and “not subject to any escalation under whatsoever ground till the completion of the work”, the Court held that “The learned arbitrators, could not therefore have awarded any amount on the ground that the appellant must have incurred extra expense in carrying out the construction after the expiry of the original contract period”. It was held that the stipulation clause in the contract was binding on the parties as well as the Arbitrator. It was categorically held “Merely because time was made the essence of the contract and the work was contemplated to be completed within 15 months, it does not follow that the aforesaid stipulation was confined to the original contract period”.

13. Reliance placed by the learned counsel for the Contractor on the decision in *K.N. Sathyapalan v. State of Kerala* 2006 (4) Arb LR 275(SC) appears to

be misplaced since that was not a case where the clauses in the contract clearly stated that the prices would be firm. In any event, once it was found by the Arbitrator that it was not NBCC alone which was responsible for delay, the question of giving a go by to the clauses of the contract and awarding enhancement over the rates by 15% did not arise. The decision in ***Bengal Traders v. West Bengal State Electricity Board 2001(2) RAJ 315(SC)*** is also distinguishable on facts. There it was found that the claim was not for escalation but for damages.

14. The Court accordingly finds that the learned Arbitrator has in deciding Claim No. 5 failed to apply the clauses of the contract which were binding on the parties and has therefore committed a patent illegality. The Award in respect of Claim No.5 cannot be sustained and is hereby set aside.

15. The next challenge to the Award is in respect of Claim No.9. The learned Arbitrator has awarded to the Contractor Rs.1 lakh for idle labour. Here the learned Arbitrator held the NBCC to be primarily responsible for the delay. However, the learned Arbitrator has not explained why he considers the amount of Rs.1 lakh to be reasonable despite noting the contention of NBCC that “no proof of payment actually made has been furnished.” It was further pointed out that the Contractor also failed to prove the duration for which

payment for idle wages was allegedly made. In fact the learned Arbitrator notices that in their letter dated 15th February 2000 the NBCC has clarified that the Claimant's labour was sitting idle "because of not getting the wages". In the circumstances, the award of Rs.1 lakh under Claim No.9 appears to be based on no evidence whatsoever and is also inconsistent with the finding in regard to Claim No.5 where the Arbitrator found the Contractor to be responsible for 30% of the delay. As explained by the Supreme Court in *K.P.Poulose v. State of Kerala, AIR 1975 SC 1259*, this would amount to legal misconduct by the Arbitrator. The Award in respect of Claim No.9 is therefore also not sustainable in law and is hereby set aside.

16. As regards Claim No.6 which was for refund of the amount of BG to the tune of Rs.4,67,000, the learned Arbitrator appears to have based the Award on the ground that the Contractor cannot be held responsible for the delay because "primary breach of contract (was) on the part of the Respondent". The above finding appears to be inconsistent with the finding rendered elsewhere in the impugned Award where the Arbitrator observed as under:

".....all was not well as regards Claimant's resourcefulness and efforts were concerned as they too were dis-organized to some extent, lacked professional competence in some measure and were lacking in resources".

17. It is also been inconsistent with the finding in respect of the Claim No.5 that the Contractor was responsible for 30% of the delay. Consequently, the release of Rs.4,67,000 under Claim No.6 appears to be wholly unjustified.

18. Consequently, the impugned Award as regards Claims 5,6 and 9 is hereby set aside. The Award of interest on the said sums under Claim No. 15 is also set aside. However, the Award in respect of Claim No.2 is upheld.

19. The challenge by the Contractor in OMP No. 215 of 2013 is to the Award to the extent it allowed some of the counter claims of the NBCC and to the extent certain claims of the Contractor were not allowed.

20. Counter claim No.2 concerned the recovery on account of excess consumption of steel to the tune of Rs. 3,57,836. This was a contract where the NBCC was to supply the materials for the work to be performed by the Contractor. Documents had been placed on record before the learned Arbitrator to show the final quantity of steel of various diameters which have been supplied to the Contractor but not accounted for. Before the learned Arbitrator it was shown that the quantity consumed as per bill on record was 112.4376 metric ton (MT) whereas in a letter dated 16th July 2001 issued by NBCC only 96.9029 MT was shown. Consequently, the

counter claim was allowed only to the extent of Rs. 1,78,918.

21. According to the learned counsel for the Contractor it was in the letter dated 28th January 2001, tendered along with the statements of claims that the quantity of steel consumed was indicated. The balance quantity in terms of the said letter did not match with the quantity claimed in the counter claim. According to the Contractor the quantity of steel paid in the 11th and 25th bills aggregated to 112.46 MT.

22. The Court is of the view that this is a purely factual determination on which the view of the learned Arbitrator should be held to be conclusive.

23. It is then contended that on the material accounts statement , the learned Arbitrator had passed a contradictory Award and restricted the claim of withheld amount to the extent of Rs. 53,000. However, without referring to those documents both Counter Claims 2 and 3 were allowed, with Counter Claim 3 being recovery on account of excess consumption of nuts and bolts and other accessories and earth wire.

24. The learned Arbitrator noted that the Contractor had not submitted the MAS account as per the terms of the work order. Moreover, NBCC's

counter claim for other accessories and earth wire were not allowed. The claim was modified only to Rs.80,493. Consequently, the Award to that extent does not call for interference.

25. The award in respect of counter-claim No. 5, i.e., hire charges of T&P, has also been challenged by the Contractor. The Court finds that only a sum of Rs. 50,000 has been awarded and for valid reasons. This was after noting that an amount of Rs. 51,000 has been withheld by the Respondent from the dues of the Contractor. The Court finds that no ground has been made for interfering with the said award.

26. Counter-claim No. 8 was for a sum of Rs. 2,28,150 towards excess amount spent on testing of materials. The learned Arbitrator noted that only the expenditure incurred towards travel has been furnished but no concrete documentary evidence had been produced by the NBCC in support of the expenditure . The Court finds that the award of Rs. 60,000 was not based on any evidence whatsoever and therefore, this award is liable to be set aside.

27. As a result as far as the challenge to the award in respect of counter-claims is concerned, the Court is inclined to set aside the award as regards counter-claim No. 8 and the corresponding interest on the said sum.

28. The net result is that OMP No. 171 of 2013 is disposed of by setting aside the impugned Award in respect of Claim Nos 5,6, 9 and interest on the said sums under Claim No. 15. OMP No. 215 of 2013 is disposed of by setting aside the award in respect of counter-claim No 8 and the award of the corresponding interest on the said sum. The impugned Award in all other respects is upheld.

S. MURALIDHAR, J

APRIL 15, 2015
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