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

Reserved on: 08.10.2015
Pronounced on: 29.10.2015

+ **FAO (OS) 302/2010, C.M. APPL.18098/2014**

UNION OF INDIA AND ANR.

.....Appellants

Through: Sh. J.K. Singh, Advocate.

Versus

CHENAB CONSTRUCTION JOINT VENTURERespondent

Through: Sh. Navin Chawla with Sh. Nitin Gupta, Sh.
Aditya. V. Singh and Sh. Amit Gupta, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S.RAVINDRA BHAT

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1. The Union of India ("UOI") in this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") questions the judgment and order of the learned Single Judge dated 05.03.2010 in OMP 44/2010.

2. The brief facts are that the respondent (hereafter referred to as "the claimant") was awarded a contract of design and construction of viaduct for a Single Line BG Railway track in Zone E-18 on the Jammu-Udhampur Rail Link Project. The work included soil investigation, detailed designing and construction of foundations, piers and abutments. The formal contract

document in the form of agreement was executed on 17.02.1996. Upon completion of contract, disputes arose between the parties. The claimant demanded a sum of ₹498.48 lakhs. Since the dispute could not be resolved amicably, it was referred, in terms of Clause 64 of the General Conditions of Contract No.3, to the Arbitral Tribunal. The Tribunal awarded the claimant a sum of ₹4,28,56,537.07 and ₹99,73,131 (i.e. interest @ 9% from the date of final bill – which was 15.05.2006).

3. The UOI felt aggrieved and preferred objections under Section 34, being OMP 44/2010. This pertained *inter alia* to Claim Nos. 26 and 8; additional claims and the interest. When the objections were heard – as is evident from Para 2 of the impugned order- arguments were addressed only in respect of Claim Nos. 6, 9, 10, 26 and 8; additional Claim Nos. 1, 6 and the award of interest. The discussion in the impugned judgment reveals that the learned Single Judge considered the submissions and went into reasons recorded in the award in respect of Claim Nos. 6, 9 and 10 and was of the opinion that no fault could be found with them. Thereafter, learned Single Judge proceeded to deal with the “Price Variation” Clause embodied in Claim Nos. 26 and 8. Here, the UOI had urged firstly that these were “excepted matters” and consequently should not have been considered and award rendered by the Tribunal. On the merits, it was urged that since the specific price variation conditions allowed 15% for the work, as the variation, the award for the amount of ₹1,98,14,719.57 was unjustified.

4. The learned Single Judge dismissed both the submissions holding that: (a) the question itself was referred by the UOI for arbitration, and (b) that work beyond the period agreed, and upon extensions, could not be

considered as falling within the contract and that consequently the claim for price variation could not be limited to only 15%. Likewise, with respect to additional claim no.1, i.e. refund and recoveries made by the petitioner for certain equipment, learned Single Judge noted that reliance upon additional claim no.6 and upon a condition that amounts could be withheld in respect of a money payable under some other contract could not apply in the circumstances. The UOI's objection with regard to payment of interest – based upon its reliance on Clause 16(2) was rejected after due consideration of the decisions cited on its behalf.

5. Learned counsel for the UOI has urged that the findings with respect to excepted matters, are erroneous. He argued that a plain reading of the conditions of the contract would show that the disputes relating to price variation were non-arbitrable. Learned counsel relied upon the judgment of the Supreme Court in *General Manager, Northern Railway v. Sarvesh Chopra* AIR 2002 SC 1272. It was highlighted that like in that case, the conditions with respect to price variation were specifically excepted. Learned counsel submitted, therefore, that the findings of the learned Single Judge are not sustainable.

6. Learned counsel next urged that on the merits, the price variation claim could not have been allowed. Highlighting that the conditions were categorical in that the parties had agreed for a cap of 15% on price variation, the award for ₹1,98,14,719.57 was unwarranted. Learned counsel relied upon Clauses 32.3 and 32.4 of the conditions in this regard. It was stated that the extensions granted to the claimant were at its behest and though penalty was not levied, the fact remained that it could not complete the work. Since

the UOI would have possibly faced further delays in the event of termination of the contract, it was considered pertinent to grant extensions sought.

7. Learned counsel reiterated the grounds with respect to the additional claim no.6 and stated that in terms of the contract the amounts would be withheld. Learned counsel lastly urged that award of interest was barred. In this regard, learned counsel relied upon Clause 16(2), to say that interest would not be given for any outstanding amounts. He referred to the decisions of the Supreme Court in *Sayeed Ahmed and Co. v. State of U.P. and Ors.* 2009 (12) SCC 26; *Sree Kamatchi Amman Constructions v. The Divisional Railway Manager (Works) Palghat and Ors.* 2010 (8) SCALE 293 and the Full Bench judgment of this Court in *UOI v. M/s. Conbes India Pvt. Ltd.* [FAO(OS) 494/2010, decided on 24.02.2012]. It was further urged that the award of interest was excessive in the circumstances and that this Court should reduce the *pendente lite* interest. For this purpose, learned counsel relied upon the decision reported as *Krishna Bhagya Jal Nigam Ltd. v. G. Harschandra Reddy* AIR 2007 SC 817 and *Union of India v. Krafters Engg & Leasing (P) Ltd.* 2011 (7) SCC 279.

8. Learned counsel for the claimant argued that the reliance placed upon Clauses 9.2, 11.0 and 21.5 of Special Conditions of Contract, to say that Claim Nos. 26 and 8 were “excepted”, is without any basis. It was urged that since the matter was specifically referred to the arbitrators by virtue of letter dated 05.12.2007, and the further letter of 31.07.2007, it is no longer open to the UOI to say that Claim Nos. 26 and 8 were excepted. It was also highlighted that the plea of such excepted matters were never taken in the arbitration proceedings – a finding rendered by the learned Single Judge. On

the merits of price variation claim, it is contended that the Tribunal took note of the fact that the original date of completion of work was 07.02.1998. Even though the UOI was aware that works could not be completed till completion of additional pier no.1, the award by the appellant to another contractor was made on 25.04.2003. The completion of additional pier was connected with the claimant's work for viaduct E-18; the ensuing delay was not on its account. The work was actually satisfactorily completed on 15.06.2004. It was pointed out that the period of execution of award was extended 9 times for a total duration of 77 months. The UOI was aware of these circumstances. Given these facts, there was no justification in restricting the amounts to be paid on account of price variation to only 15%. Learned counsel submitted that the amounts paid were on account of the escalation and price increase due to delay of about 7 years.

9. It was submitted next that with respect to additional claim no.6, no sustainable ground has been urged by the appellant to upset the findings of the learned Single Judge. Learned counsel submitted that the question of withholding any account could have arisen if outstanding amounts were payable by the Contractor under some other arrangement or agreement. None were shown during the arbitration proceedings. Consequently, the amounts were withheld without justification and the Tribunal correctly inferred it to be so. It was lastly urged that the reliance placed by the UOI upon *Sayeed Ahmed (supra)* and *Sree Kamatchi Amman Constructions v. The Divisional Railway Manager (Works) Palghat and Ors.* are not upset. It was submitted in this regard that the expression “*amounts payable to the contractor under the contract*” in Clause 16(2) is akin to or *ejusdem generis*

with the term “earnest money” and “deposit”. Since the condition states that no interest can be paid on the amount deposited as security by the contractor, amounts payable for claims, which fell outside the contract and assessed by ways of damages, would not be covered by the interest bearing conditions. Learned counsel submitted that the conditions in the contract were different from Clause 16 in the present case.

10. So far as the rate of interest is concerned, learned counsel submitted that there is no universal rule about the rate and that the Tribunal – subject to contract has discretion to award such rates as are deemed in the circumstances of each case.

Analysis and Conclusions

11. On the first issue of “excepted matters”, this Court notices that the learned Single Judge recorded the findings that the UOI never urged this aspect any time during the arbitration proceedings. Even in the petition under Section 34, no specific plea as to maintainability of Claim Nos. 8 and 6, was ever voiced as to provide the Tribunal the occasion to consider it. Furthermore, during the hearing of this appeal too, the UOI could not show any specific pleading urging the Tribunal to desist from considering the Claim Nos. 8 and 26. Furthermore, the reasons for stating that these matters as excepted, in our opinion, are insubstantial given the nature of the conditions relied upon by the UOI. The consequence of the appellant’s omission to urge this ground in its pleading as well as in the course of submissions before the Arbitral Tribunal is that it is deemed to have waived such objection under Section 4 of the Act. The other way of looking at the matter is that a statement of claim, which articulated the demand in respect

of the head Claim Nos. 26 and 8, was based upon the claimant's understanding that the amounts were payable and the disputes arbitrable. The failure of the appellant to refute those pleadings, meant that on a demurer, its unstated objection to the issue of "excepted matters" itself stood waived by reason of Section 4 of the Act. In other words, by any specifically urging non-arbitrability in its reply, the UOI is deemed to have accepted that the arbitration agreement covered those claims as well.

12. So far as the merits of the Claim Nos. 26 and 8 are concerned, this Court notices that the Tribunal elaborately dealt with this aspect and held that the contract for the additional pier no.1 was awarded after a suitable delay of around 7 years even though the appellants were aware that it was essential. That work was completed on 15.06.2004. It was only thereafter that the claimant's work could be taken-up and completed in accordance with the terms of the contract. The Tribunal's conclusions in this regard are as follows:

"The respondents have paid some escalation of amount to claimant up to 31-08-1998 and not up to 07.08.1999 and continued to pay escalation on the balance executed work on the last indices of 31.08.1998 till completion of work, withholding application of further price indices from 01.09.1998 till completion of work. The Arbitration Tribunal has also taken note of this fact that instead of 24 months work continued up to 101 months and extra period was regularized by Respondents without penalty.

The Respondents were asked to work out, amount of escalation till 31.07.2004 and the same has been worked out and have filed through their advocate before Arbitration Tribunal duly authenticated and signed by Dy.C.E/C/JAT having examined all aspects, worked out the escalation amount payable i.e.

Rs.3,36,89,983.96. The RBI indices had to be treated as frozen till the date of completion i.e. 31st July 2004 as final for considering and calculating the CC-57 and FCC-58 figures have to be arrived at Rs.43,75,374.31 which when added to earlier PVC paid till CC-56 i.e. Rs.2,85,91,951.27 coming to total amounting to Rs.3,29,67,325.58. The Respondents had paid in running bills Rs.1,31,52,606.01 on account of Price escalation till date of completion based on indices of 31.8.1998 and on star price items Rs.25,58,128.29, i.e. Rs.1,57,10,744.29 to the Claimants. The Respondents paid the price escalation upto last bill on account of Price escalation on indices of 31.8.1998 and full escalation w.r.t. star price amounting to Rs.25,58,128.29 upto date of completion notwithstanding extensions granting without benefit of Price Variation Clause. No liquidated damages were charged and certificate of successful and satisfactory completion issued at end of work. An amount of Rs.1,31,52,606.01 on account of Price escalation has already been paid to the claimants as such Rs.32967325.58 – Rs.13152606.01 = Rs.1,98,14,719.57 is awarded towards balance Price Variation Clause. The Arbitration Tribunal holds that the Claimants claim of escalation is justified and award to the claimants escalation amount of Rs.1,98,14,719.57.”

13. For the above reasons, the Court finds no merit in the submissions. The UOI's arguments that the price variation clause was specific and the Tribunal could not have awarded contract payment of anything more than 15% is consequently unmerited.

14. As far as the additional claim no.6 is concerned, this Court notes that the sum of ₹23,08,599 was sought as reimbursement of risk and cost wrongly deducted for the construction of tunnel 12 and 12A in Zone E-24. The Tribunal noted the agreement of the parties that this was a dispute pending in another arbitration proceeding. Consequently, the direction to award ₹23,08,599 was made in the award. This Court finds no reason to

interfere with the said finding considering that the learned Single Judge did not find any vitiating ground. Barring patent illegality, and award of amounts contrary to the express terms of the contract, the jurisdiction of the Civil Court under Section 34 is expressly circumscribed. Given the nature of this limited jurisdiction, the Court finds no ground to interfere with the findings of the learned Single Judge.

15. As to the question of interest, the concerned condition in the present case – Clause 16 reads as follows:

“16(1) Earnest money and security deposit:- The earnest money deposited by the Contractor with his tender will be retained by the Railway as part of security for the due and faithful fulfillment of the contract by the contractor. The balance to make up this security deposit which will be 10 per cent of the total value of the contract, unless otherwise specified in the special conditions, if any, may be deposited by the contractor in cash or in the form of Government Securities or may be recovered by percentage deduction from the Contractor’s “on account” bills, provided also that in case of a defaulting contractor the Railway may retain any amount due for payment to the contractor on the spending ‘on account bills’ so that the amount or amounts so retained may not exceed 10% of the total value of the contract.

16(2) Interest on amounts – No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.”

16. In *Sayeed Ahmed (supra)*, the condition, i.e. Clause G1.09 reads as follows:

“6. The issue regarding interest as noticed above revolves around clause G1.09 of Technical Provisions forming part of the contract extracted below :

"G 1.09 No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-charge in making periodical or final payment or any other respect whatsoever."

17. The Court, having regard to the express terms of the condition held that interest or damages were not payable by the Government in regard to money or balance lying with it, money which may become due, the amounts which may become due owing to any dispute, difference or misunderstanding between the Engineer-in-Chief and the contractor, and any delay on part of the Engineer-in-Chief in making any payment, or in any other aspect. The Court observed that such a condition, *“is comprehensive and bars interest under any head in clear and categorical terms”*. In the present case, however, the condition, i.e. Clause 16(2) is of restricted character. It refers specifically to three types of amounts, i.e. earnest money, security deposit, or amounts payable to the contractors under the contract. Plainly, the question of any amounts payable – such as difference on account of a dispute and assessed as damages – are not covered, distinguishing it from *Sayeed Ahmed’s (supra)* case. So far as *Kamatchi (supra)* is concerned, the condition in question undoubtedly was akin to Clause 16(2). The relevant discussion in para 5 of the judgment reveals that amounts withheld were on account of some dispute as to the real work done. The Court held that interest was excepted, except the claim *“related to work executed by the*

contract as part of the parcel of work contemplated under the contract.” In the present case, the amounts directed were paid specifically on account of the extensions – the case at hand being excepted under the contract since they were executed or performed during the extended period. We further notice that amounts awarded under various heads pertained to instances and demands on various accounts and did not pertain to amounts withheld under the contract. This aspect was not refuted by the UOI during the hearing. The decision of the Full Bench in *Conbes (supra)*, no doubt, facially considered the effect of Clause 16 with which this Court has been called upon to interpret. However, the question as to whether the amounts assessed as damages would fall within the description of “*payable under the contract*” does not appear to have been decided. As noticed, the other decisions, i.e. *Kamatchi (supra)* and *Sayeed Ahmed (supra)* are categorical in that interest payments in respect of specific account prohibited cannot be awarded as *pendente lite* interest. The fact situation in both those decisions exemplifies what constitutes payment under the contract. The other decision cited, i.e. *Krafters (supra)*, was also concerned with a condition akin to Clause 16(2). There too, it was open to the employer to impose a condition prohibiting interest on earnest money or security deposit or amounts payable to the contractor. The contention on behalf of the UOI was “*no interest is payable to the contractor under the contract*”. The discussion in this case veers on the expression “payable under the contract”– in fact it appears that certain amounts such as security deposit withheld and claims under the contract were part of the award.

18. As noticed earlier, the expression (“claim under the contract payable under the contract”) is specific in that it refers to payment for agreed services. Contractually, the parties had agreed that the work would be performed within 24 months in the present instance. However, the contract had to be extended for reasons beyond the control of the contractor. During the extended period, certain additional work was performed for which higher rates were claimed beyond the agreed parameters. These were really by way of damages since they were in the realm of non-contractual claims. The Court is not unmindful of the fact that the ultimate completion of the work and issuance of the final bill was informed in 2006. The arbitrators rendered their award on 25.09.2009. The reading of the award would disclose that the payments allowed towards various heads of claim were in respect of excess or additional work done or excess claims over and above payments due under the contract. Therefore, they did not clearly answer the description of Clause 16(2).

19. In these circumstances, the award of 9% *pendente lite* interest was warranted and was not forbidden or prohibited by the contract.

20. For the above reasons, we find no merit in the appeal. It is accordingly dismissed. In the circumstances, the amounts deposited in the Court and the consequent interest accrued is directed to be released to the successful party, i.e. the respondent in this case.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

OCTOBER 29, 2015