$~R-106

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

\+ **O.M.P. 357/2008**

UNITECH LTD. ..... Petitioner

Through: Mr. S.K. Maniktala & Mr. Vinod Kumar, Advocates.

versus

M/S. COMMERCIAL LINKERS & ANR. ..... Respondents

Through: None.

CORAM: JUSTICE S.MURALIDHAR

ORDER

% **25.11.2016**

1. This is a challenge to an Award dated 9th April, 2008 passed by the sole Arbitrator in the disputes between the parties arising out of a contract dated 10th October, 1996 entered into between the parties by which the Respondent was to transport crushed stone and stone dust from crusher operating site at Arrayawala Crushing Zone to various locations of Karnal-Ambala Project for the work of four-laning and strengthening of NH-1 (KM 132.675 TO KM 212.61), which was being undertaken by the Petitioner.

2. Certain clauses of the contract which are relevant for the purposes of the present petition read as under:

> "4. (d) The rates for above operation shall be adjusted for the increase and decrease in the price of diesel which is considered as Rs.7.02 (Rupees seven and paise two only) per ltr. prevailing on March'96. The record of Diesel consumption shall be properly

maintain by the sub-contractor and details of which shall be intimated to J.V.

(f) The Joint Venture shall pay interest free mobilization advance of Rs.12.5 (Rupees twelve lakhs fifty thousands) on furnishing of Bank Guarantee of equal amount from any Nationalised Bank valid for one year to be renewed on expiry. The advance so paid shall be recovered at the rate of Rs.5.00 (five) per MT from the Bills. Bank Guarantee shall be refunded on recovery of the mobilization advance. The transporter shall furnish the details of utilization for purchase of tippers and other works incidental to work within three months of the receipt failing which JV shall encash the Bank Guarantee furnished. Alternatively, the J.V. shall provide two tippers and cost incurred thereof limited to Rs.12.50 lakhs which shall be adjusted in manner proposed above."

3. The above clause has to be read along with the Letter of Intent (LoI) dated 9th April, 1996, written by the Petitioner to the Respondent. In para 4 of the said LoI, the Petitioner undertook to "reimburse the increase in cost of diesel caused by Government Order, if any, during the contract period of 2 (two) years commencing from date of issue of this Letter of Intent."

4. A distinction is sought to be drawn by Mr. Maniktala, learned counsel appearing on behalf of the Petitioner, between 'escalation' as envisaged as under Clause 4 (d) and 'reimbursement' in terms of above para 4 of the LoI. According to him, unless the claimant is unable to produce evidence of the expenditure incurred for the latter, the question of reimbursement would not arise.

5. In terms of Clause 4 (f) of the Agreement, the mobilization advance had to be given by the Petitioner to Respondent No. 1 against a bank guarantee

(BG). Respondent No. 1 did not furnish such BG for more than 17 months after the commencement of the contract. It was furnished only on 17th August, 1997 which was towards the end of the original contract period.

6. As far as the present petition is concerned, the challenge is to three specific items i.e., counter-claim No. 2, counter-claim No. 5 and the award of costs.

7. Counter-claim No. 2 filed by the Respondent was for a sum of Rs. 47,84,873 on account of balance amount of diesel escalation prices and general cost rise due to delay. In discussing this claim, the learned Arbitrator noted that Respondent No. 1 had been paid the diesel price from the point of loading to the point of unloading. What Respondent No. 1 claimed was the cost of diesel from the point of unloading to the point of loading. The contention of Respondent No. 1 was that insofar as the trucks that moved with the material from the crushing site till the camp site had been paid the increase in the diesel price for that journey, it was but logical that a similar increase in the diesel price should have been paid for the return journey i.e., from the camp site to the place of crushing. The learned Arbitrator then discussed clauses 3(f) and 4(d) of the contract and noted that the said clauses were silent on the above aspect. On the question whether there could be an "implied contract" in that regard, the learned Arbitrator referred to the decisions in ***Delhi Cloth and General Missl. Co. Ltd. v. K.L. Kapoor AIR 1958 Punjab 93*** and ***Deviprasad Khandelwar & Sons v. Union of India AIR 1969 Bombay 163*** and held that "necessarily the trucks which would go back for re-loading would incur an expense", thus rejected the contention that because there was no such contract, the

claim must fail.

8. The learned Arbitrator then referred to a letter addressed to the Petitioner by Respondent No. 1 on 28th April, 1997 stating that the increase in the price of diesel had been allowed "for up and down distances" and noted that such communication was received by the Petitioner. In that regard, the learned Arbitrator noted that while there was no record produced regarding diesel consumption, it was held that "the maintenance of the record is not a *sine qua non* before compensation can be granted" further noting that a reading of Clause 4 (d) of the Agreement provided that "what is mandatory is that the rates for the operation were to be adjusted for increase and decrease in the price of diesel". After noting that it would be better if accounts were maintained, it was observed that it could not be implied that Respondent No. 1 would not be entitled to any amount if such accounts were not maintained as long as "the same can be arrived at." The learned Arbitrator appears to have accepted the cost analysis of some other company, M/s. United Construction Co. Ltd., as indicative of what should be the basis for compensating Respondent No. 1 for increase in the diesel price.

9. The Court finds that the learned Arbitrator confused the concept of 'escalation' in diesel price with 'reimbursement'. What was being claimed was, in fact, a reimbursement of the increased diesel cost incurred by Respondent No. 1. It is not understood how such a reimbursement claim could be entertained without Respondent No. 1 producing the accounts and the documents necessary to show diesel consumption as well as the amount spent. A reimbursement could not have been ordered on the basis of

surmises and conjectures and the diesel consumption pattern of some other entity.

10. Indeed, what had been agreed to between the parties in terms of clause 3 (f) was that the Petitioner would make payment "on per tonne per km. Basis" suggesting that the payment would be for the journey from the crushing site to the camp site and not vice-versa. The Arbitrator had to go strictly by the clauses of the contract. He could depart from the contract clauses only where the parties had authorised him to do so. This is made explicit in Section 28(2) of the Act. Without the record of diesel consumption and without production of the bills/challans of actual consumption of the diesel reflecting the enhanced rate of diesel, there could not have been any Award of such a counter-claim on any "reasonable estimate" basis.

11. A meeting was held between the parties for amicable settlement, which was not an admission on the part of the Petitioner of any liability. In the impugned Award, it is recorded by the learned Arbitrator that after initially having made a counter-claim for diesel escalation prices and delay in the sum of Rs.47,84,873, Respondent No. 1 apparently restricted this claim at the hearing in the arbitration held on 26th July, 2001 to Rs. 22 lakhs. Again, Respondent No. 1 did not explain the basis for limiting the claim to Rs. 22 lakhs. The Arbitrator observed, in relation to the record of the meeting of that date, that "this is an admitted document." What was being referred to was a mere record of proceedings and this did not amount to an admission by the Petitioner of its liability in that regard.

12. The Arbitrator then observed that given that an amount of more than Rs. 4 crores was paid by the Petitioner for escalation, the sum of Rs. 22 lakhs is obviously a reasonable amount. This is pure guess work by the Arbitrator. In similar circumstances, this Court in an order dated 15th April, 2015 in OMP No.171/2013 (***National Buildings Construction Corporation Ltd. v. M/s. Harjinder Singh Namdhari***) set aside a similar Award since it was based on no evidence whatsoever. For the same reasons, the Court sets aside the impugned Award as regards counter-claim No. 2.

13. The next challenge is with respect to counter-claim No. 5 whereunder Respondent No. 1 claimed Rs. 25 lakh loss due to non-release of the mobilisation advance. What is strange insofar as this part of the impugned Award is concerned is that the learned Arbitrator comes to the conclusion that Respondent No. 1 did not indicate "as to how and in what manner a loss of Rs/ 60 lakhs (reduced to Rs. 25 lakhs) has been suffered". He further notes that "a figure for the profit or loss could only be arrived at if the said amount of profit or loss could be disclosed and thereafter from what is being presumed (for the sake of argument) it could be deleted. In the absence of the same and lack of other evidence the plea must fail."

14. Despite the above conclusion, the learned Arbitrator proceeded to grant a sum of Rs. 3 lakhs on this claim which was a guess work that "had the mobilization advance had been given to Respondent No.1 it would have certainly been put to some use" and Respondent No.1 “could easily earn if nothing else a reasonable amount of interest.” Interestingly, the initial claim in this regard was Rs. 60 lakhs, which was then reduced to Rs. 25

lakhs and ultimately, a sum of Rs. 3 lakhs was granted, again, on surmises and conjectures without there being any material placed by Respondent No. 1 to substantiate its claim before the learned Arbitrator. Therefore, counter-claim No. 5 being allowed to an extent of Rs. 3 lakhs by the learned Arbitrator was also based on no evidence whatsoever. The Court hereby sets aside the impugned Award as regards counter-claim No. 5.

15. The learned Arbitrator has awarded Respondent No. 1 costs of Rs. 3 lakhs whereas the sum total of counter-claims allowed by the Arbitrator excluding counter-claim Nos. 2 and 5 works out to Rs. 2,11,232. The claim of the Petitioner that has been allowed is Rs. 1.66 lakhs approximately. In that view of the matter, the Award of Rs. 3 lakhs as costs to Respondent No. 1 appears to be totally unjustified. Consequently, the Court sets aside the Award of arbitration expenses of Rs. 3 lakhs in favour of Respondent No. 1.

16. The petition is disposed of in the above terms.

NOVEMBER 25, 2016 **S. MURALIDHAR, J.**

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