

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

% *Judgment Reserved on : January 18, 2016*
Judgment Delivered on : January 22, 2016

+ **FAO (OS) 412/2015**

BSES YAMUNA POWER LTD. & ANR.Appellants

Represented by: Mr.Sandeep Sethi, Sr.Advocate
instructed by Mr.Arav Kapoor,
Advocate

versus

M/S. TALUPULA ENGG. CO.Respondent

Represented by: Mr.Vaibhav Gaggar, Advocate
with Mr.Aaditya Vijay Kumar and
Mr.Abhimanyu Chopra, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Award dated December 26, 2006 passed by the Arbitral Tribunal comprising three members has been upheld by the learned Single Judge as per the impugned order dated April 29, 2015, save and except the claim regarding interest. As against 12% per annum for claim No.7 and 18% per annum for rest of the claims, the learned Single Judge has reduced the interest to 10% per annum. No cross-objections or cross-appeal has been filed by the respondent. The appellant which had a laid a challenge to the award is aggrieved by the decision of the learned Single Judge and thus our concern in the appeal would be to the issues decided by the learned Single Judge other than the reduction in the rate of interest.

2. The appellant invited offers as per a tender floated by it for supplying material, erecting and commissioning a 66KV 4CKT tower line from 220KV South of Wazirabad Grid Station to 66KV Shastri Park Grid Station. Respondent's bid was accepted. A purchase order as also a work order was issued on December 20, 2002 at a lump sum price of ₹1,74,50,000/-. The work was to be completed in three months. It is not in dispute that the two orders were found to be deficient in many respects and therefore the appellant issued first amendment vide their letter No.CMC/BSESRPL/02-03/IF/APDRP/157 dated January 13, 2003 and letter No.WO/BSESYPL/02-03/016 dated January 13, 2003. As per this amendment the completion period has been indicated as four months.
3. It is not in dispute that responsibility for the design of the towers to be erected and the layout of the supply line was on the appellant.
4. The work could not be completed within the stipulated period of four months and who was responsible for the delay : a question of fact to be decided with reference to the evidence, discussing the correspondence between the parties, the learned Arbitral Tribunal has returned a finding as under:-

“The responsibility for designs was that of the Respondent. Just after casting one foundation it was found that the designs, as specified, would not suit the riverbed and the work was stopped by the Respondents. The Respondents after 4 months awarded a consultancy contract to Power Grid Corporation of India Limited (PGCIL) vide their Work Order No. CMC/BSESRPL/03-04/01-03 dated 28/04/2003. It took PGCIL 4 months to finalise the designs.

The scope of the work, consequent on revised designs got substantially changed. To incorporate these changes the Respondents issued fresh amendment/order vide letter No.CMC/BSESRPL/02-03/IF/APDRP/157 dated

22/09/2003 and WO/BSESYPL/02-03/016 dated 22/09/2003 with a completion period of 20 days only.”

5. Learned senior counsel for the appellant did not attack said finding, which is one of fact based on evidence, returned by the Arbitral Tribunal, which finding we find was attempted to be attacked before the learned Single Judge but found no merit therein. Indeed, a finding of fact returned by an Arbitral Tribunal cannot be questioned by calling upon the Court to re-appreciate the evidence. A material document overlooked or a finding which is perverse qua a factual aspect would be a different matter.

6. We thus proceed ahead on the onward journey by treating the award as final concerning the attributability of the delay in completion of the work squarely on the shoulders of the appellant till September 22, 2003.

7. With reference to the amendment to the purchase order and the work order as revised and issued on September 22, 2003, 20 days' period was specified for completion of the work.

8. This took the learned Arbitral Tribunal straight to the question : whether the time allowed was reasonable. Learned counsel for the appellant did not dispute that this question logically arose for consideration and it fell within the domain of the Arbitral Tribunal to answer the same. In the words of the Arbitral Tribunal, and we quote from the award, the answer is as follows:-

“This was totally unrealistic, considering the volume of the work left over and the engineering practice, time involved in casting of foundations, interval of time required for curing of foundations before erection of towers, insulators and hardware, stringing of conductors, testing and commissioning. Due to considerable delay in finalization of firm orders and changes in designs, claimant came up for revision of prices.”

9. The reasoning of the Tribunal in its answer is based upon volume of the work left over, engineering practices, time required in casting of foundations, interval of time required for curing of foundations before towers could be erected. Time required for stringing of conductors and for testing and commissioning. Nobody can even dare argue that the reasoning is unreasonable; far less to urge that the reasoning is perverse.

10. What occasioned the further delay has thereafter been considered by the Arbitral Tribunal with reference to the evidence before it, and like in the one but preceding paragraph as we have done so, we speak through the mouth of the Arbitral Tribunal by quoting from the award. The Tribunal spoke:-

“The Claimant has highlighted the following major difficulties, which were encountered during execution of the work besides inordinate delay in finalization of designs such as obstruction and resistance by the farmers on whose land the Tower Line was to traverse, non completion of statutory formalities by the Respondents in respect of obtaining various clearances required under the Electricity Act for laying of the Tower Line, lack of inter departmental co-ordination within the Respondent’s organization, non supply of material by Respondents required for execution of works, delay in payments by the Respondents and delay in inspection of material lying with the suppliers, etc.

As the work had been badly delayed, after several meetings and discussions between the Claimant and Respondent, it was agreed by the Respondent in their letter dated 28/05/2004 that the work would be completed by 15/07/2004 and the Respondent also agreed to provide increase in prices to the Claimant occasioned due to inordinate delay in completion of work for reasons attributable to Respondents.”

11. Once again, we find that the question of further delay, which was one of fact has been decided by the Arbitral Tribunal in light of the evidence led and the reasoning is sound; in any case cannot be labeled as a perverse finding.

12. Therefore, the delay up to May 28, 2004 rests squarely on the shoulders of the appellant and the finding in the award, which is based upon evidence, being one on a question of fact; suffering from no infirmity or perversity has to be upheld. The learned Single Judge has rightly upheld the same.

13. The reference in the award to a letter dated May 28, 2004 has a slight error, but the same is irrelevant. There is no letter written by the appellant to the respondent on May 28, 2004; a fact conceded to by learned counsel for the parties. The reference is to a recording in the file, duly signed by the representative of the appellant on May 28, 2004. The note sheet dated May 28, 2004, the part typed in normal font being recorded by the appellant and the one in the bold by the respondent, reads as under:-

***“CONSIDERATION OF REQUEST MADE BY
M/S.TALAPULA FOR INCREASE IN RAW MATERIAL
COST DUE TO DELAY IN EXECUTION OF PROJECT –
220KV SOUTH WAZIRABAD GRID STATION TO 66 KV
SHASTRI PARK GRID STATION***

*We have analyzed the case and our
observation/recommendations are as follows:-*

*The original contract has been placed on 20-12-2002
however due to undue delay in finalizing the various
details and protest from land owners this work has been
finally under execution in the month of May 2004.*

*Due to the delay, rates of certain raw material have got
substantial increase. IT has been decided by the*

management to reconsider the additional cost to the vendor due to increase in rates of steel and goat conductor as per the following:

STEEL

<i>Qty req..</i>	<i>Qty. recd.</i>	<i>Bal. Qty.</i>	<i>Old rates</i>	<i>Rate asked</i>	<i>Rate recomm.</i>	<i>Difference in value</i>
<i>177.15 mt</i>	<i>63.27 mt</i>	<i>113.88mt</i>	<i>3300 00/p mt</i>	<i>47560 /pmt</i>	<i>41000/p mt</i>	<i>8000x113.88=911040</i>

GOAT CONDUCTOR

<i>Qty req.</i>	<i>Qty. recd.</i>	<i>Bal. Qty.</i>	<i>Old rates</i>	<i>Rate asked</i>	<i>Rate recomm.</i>	<i>Difference in value</i>
<i>30 km</i>	<i>Nil</i>	<i>30 km</i>	<i>131550 /km</i>	<i>168000 /km</i>	<i>1,45,202</i>	<i>13652x30 = 409560</i>

In view of the above recommendations the total cost of the project will be increased by ₹13,20,600/-.

Note: While deciding the rates for Goat Conductor provision for wastages @ 2% as permitted by GM EHV Shri Tankhiwala have been considered.

- 1) Bar chart (revised) to be submitted by TEC, with a complete completion of job by 15 July 04.*
- 2) Weekly progress report to be verified from GM (EHV) and same may submit to Dir. (Operation).*
- 3) TEC representative has to attend the weekly meeting at BSES Delhi Head Office.*
- 4) BSES suggest to have a penalty of ₹50,000/- for each day of delay effective from 16 July 04. TEC to confirm the same by 29/05/04.*

Accepted as above except that steel price should be taken @ 45,000/- PMT instead of ₹4,000 PMT for the balance quantity to the supplier as stated above.

14. Correcting the said narrative error in the award, we highlight that as regards the merits of the factual aspect, it makes no difference whether one refers to a letter dated May 28, 2004 or noting in the note sheet dated May 28, 2004, because the factual matrix is the writing.

15. The learned Arbitral Tribunal has then proceeded to note that as per the agreement entered into on May 28, 2004 time for completing the work was extended till July 15, 2004 and penalty of ₹50,000/- per day would be from July 16, 2004. A revised bar chart had to be submitted by the respondent.

16. Though the Arbitral Tribunal has not noted, but admittedly a bar chart was submitted by the respondent under cover of its letter dated May 31, 2004.

17. The offending termination of the contract is in a letter dated June 04, 2004, which concededly is very significant. The Arbitral Tribunal has thereafter noted that what prompted the termination of the contract post agreement entered into on May 28, 2004 is not forthcoming on record. Indeed, during arguments in the appeal learned senior counsel for the appellant could throw no light on the reasons which led to the contract being terminated. Once again, in the language of the learned Arbitral Tribunal, including noting the contents of the letter dated June 04, 2004 the narratives of the facts are as under:-

“However, for reasons which are not clear on record, the Respondent informed the Contractor on 04/06/2004 that the Contract stood withdrawn from the Claimant and balance work had been awarded to some other contractor

and that additional cost payable to the new contractor would be adjusted from contract amount due to the Claimants. As this letter is very significant in determination of issues involved in the arbitration, the same is reproduced below:-

04/06/2004

*“Mr. Nanda Gopal – MD
M/s. Talupula Engineering Company
C-47, Malviya Nagar
New Delhi-110017*

Sub: In ordinate Delay and non-responsiveness in execution of work of Erection and commissioning of 66KV Four (4) Circuit Tower Line from existing 220 KV South of Wazirabad Grid Station to 66 KV Shastri Park Grid Station.

Dear Sir,

We had awarded you the above said job through our Purchase Order No.CMC/BSESRPL/02-03/IF/APDRP/124 dated 14/11/2002 for supply of equipments and Work Order No. WO/BSESYPL/02-03/016 for Erection and Commissioning of the same.

We had awarded you the contract on the fixed price basis and the job has to be completed within the stipulated time frame as clearly mentioned in our contract. However, due to various reasons, the project had not been completed till date and on the basis of your suggestion and feedback, we had also agreed to provide you the increase in the total cost of the project subject to completion of the same in all respect by 15th July, 2004.

However, despite our final discussions held on 28th May, 2004, no further communications have been

received from your end for completion of project by 15th July, 2004.

You must be aware that this is a very high priority work and cannot be delayed beyond the stipulated date. In view of the above, we are constrained to award the balance unexecuted job to another contractor. The additional cost payable to the new contractor will be adjusted from the contract amount awarded to you.

Please note the above for your necessary action.

Thanks

For BSES Rajdhani Power Limited

Naveen Kumar Vats

Business Manager – Contracts”

Consequent on withdrawal of the work, the material and Tools and Plant lying in the custody of the Claimant at his depot in Respondent controlled territory, were carried away by the Respondents allegedly without the consent of the Claimant and by using threat and force about which the claimant protested and represented vehemently as per the documents in the written submission of the Claimant.”

18. From the reasoning in the award it is apparent that the appellant tried to justify the contract being terminated by relying upon clause 11 of the contract. Discussing said aspect of the matter and the evidence concerning the delay in completion of the work leading up to its termination, the learned Arbitral Tribunal has penned its thoughts as under:-

"We have carefully considered the pleadings of both the parties, the documents on record, evidence of witnesses, arguments of both the parties and proceed to make our award after consideration of the entire matter.

The contract was rescinded without any notice during the extended validity of the contract on grounds that the work

being high priority could not be delayed beyond stipulated date.

The Tribunal examined the provision in contract No.WO/BSESYPL/02-03/16 which vide clause 11 stipulates.

"If the Contractor failed to erect and commission any or all the equipment or perform the services within the time period specified in the contract, the Company shall, without prejudice to its other remedies under the Contract, deduct by way of liquidated damages a sum equivalent to 0.5% of the order, value for each week or part thereof for delay until the actual date up to a maximum deduction of 5% of order value. Once the maximum is reached the Company may consider termination of contract without any liabilities to the Company."

The validity of the contract as extended by the Respondents was up to 15th July, 2004. Therefore, the basic premise on which the above quoted clause provides for the levy of liquidated damages and termination of the contract had not arisen. When the circumstances for invocation of the clause had not arisen, the question of rescission of contract could not arise. The Tribunal further notes that the delay was primarily attributable to the Respondents inasmuch as they failed to discharge their contractual obligations adequately and in time & Tribunal also notes that no notice for termination of contract was served on the Claimant.

Arbitral Tribunal, therefore, considers the rescission of the contract as arbitrary, unjust and illegal.

The contract was as originally awarded on 20/12/2002 to be completed within three months. However, it took eight month for the Respondent to finalize the designs., through a separate consultancy contract on PGCIL. A perusal of amendment to work order dated 22/09/2003 shows that PGCIL made substantial changes leading to change of entire complexion of work. The relevant extract of the

amendment issued by the Respondents vide amendment to work order dated 22/09/2003 is as follows:-

"We would like to inform you that major changes as suggested by PGCIL are as under:-

- A. Changes in foundation design*
- B. Changes in thickness of lean mixture*
- C. Changes in route of the tower line*
- D. As we have to cross 220 KV O/H Tower Line, 5 nos. gantries to be erected for lowering the height of Conductor (which was not earlier in your order)*
- E. Heavy Concrete Structure to be provided.*

In view of the above, we hereby amend our Purchase Order as under:-

The statutory formalities for laying of the Tower Line on a specified route and as provided for in the Indian Electricity Act were also not legally and adequately complied with by the Respondent leading to resistance from the farmers over whose land the line was to traverse. Initially the Respondent left such matters to the Claimant to handle despite Claimant's request. It was only after considerable lapse of time that the Respondent intervened in the matter and paid part compensation to the farmers.

The Tribunal is rather surprised to note the tactics advised to the Claimant by AGM (Project) in his letter dated 14/10/2003 which read as follows:-

"The matter relating to villagers of area is being sorted out but you are advised not to stop the work and put additional labour force to put pressure on them."

The quantity of various items of work in the contract underwent major changes due to new designs as prepared and approved by PGCIL. The basic foundation designs were changed from simple raft foundation to complex pyramid & chimney type foundation as well as

introduction of rail structure instead of fabricated tower for certain locations.

The Respondent took considerable time in completing various formalities regarding negotiation for revision of prices due to drastic change in the format of contract. These formalities were still in process when the contract was rescinded.

The allegation of the Respondents such as lack of financial and managerial capacity of the Claimant, partners deserting the firm and the proprietor trying to get Lok-Sabha seat and not devoting his attention to work are neither relevant nor substantiated and the Tribunal attaches no significance to these allegations.

In context of rescission of the contract, the Tribunal considers it pertinent to examine the letter, which was later deemed as termination by implication by the respondents. This has been reproduced verbatim earlier. The letter states that:-

"Despite our final discussions held on 28th May, 2004 no further communications have been received from your end for completion of the project by 15th July, 2004 you must be aware that this is a very high priority work and cannot be delayed beyond stipulated date. We are constrained to award the balance unexecuted job to another contractor."

The Tribunal notes that merely non-receipt of a reply from the Claimant within 6 clear days or 4 working days was made a pretext by the respondent for implicit termination of the contract, without any notice. This is not only against principles of natural justice but also in contravention of terms of the contract relating to termination of contract.

In this context the Tribunal examined the content of the note in which the date of 15th July, 2004 was fixed for completion. The note is in the handwriting of Sri Naveen Vats, Business Manager, Contract and reads as under:-

"(i) Bar Chart (revised) to be submitted by TEC, with a completion of job by 15th July, 04.

(ii) Weekly progress report to be verified from GM (EHV) and same is only to be submitted to Dir (Operations).

(iii) TEC representative has to attend the weekly meeting at BSES Delhi, Head Office.

(iv) BSES suggest to have a penalty of ₹50,00,000.00 for each day of delay effective from 16th July 2004. TEC to confirm the same by 29/05/04."

Here again there is no mention of termination of the Contract. There is only a suggestion of penalty of ₹50,000.00 (Rupees Fifty Thousand only) per day. All the above further reinforces the Tribunal's conclusion that the implicit termination was unjust, arbitrary, illegal and against the provisions of the contract. Curiously, the Claimant's letter No.TEC/BSES/286 dated 31/05/2004, which is in compliance to respondents demand, has been submitted by respondent as one of the documents accompanying their written submission. This has been admitted by Respondents in their reply to Claimants' statement of claim. This implies a prejudiced approach of the Respondent in implicitly terminating the contract in violation of Contractual provisions.

The Arbitral Tribunal feels that such abrupt and arbitrary rescission of the contract was a breach of the Contract on the part of the Respondent. It is surprising that no notice was given to the Claimant and despite alternate remedies the contract was rescinded during extended validity. The unrealistic approach of the respondent to the whole issue is clearly brought out by the fact that it took more than 5(five) months, (in context of 20 days permitted to the Claimant) to complete the work through other agencies as per Respondents' Manager's submission. In this connection, in answer to a question by the Tribunal, Sri D.R.Gautam, Manager of Respondent, who was the in-charge of the work has stated that the line was energized

only on 27/02/2005, viz. 8 (eight) months after the rescission of the contract."

19. Succinctly put, the learned Arbitral Tribunal has noted that having issued the work order and amending the same on January 13, 2003 the work was to be completed in four months. Far from work being delayed in said four month period the learned Arbitral Tribunal found that work could not progressed till September 22, 2003 due to the design of the foundation of the towers not matching with the soil condition requiring appellant to appoint PGCIL as a consultant to finalize the drawings and the designs. After the consultant completed its assignment amended work order was issued on September 22, 2003 making substantial changes in the design which amounted to a change in the entire complexion of the work. Learned Arbitrator found that evidence established that the appellant was responsible for further delay because it did not obtain statutory approvals required by law for undertaking the work; appellant did not pay compensation to the farmers through whose lands the supply line had to pass leading to resistance by the farmers etc. Finding defaults attributable wholly to the appellant the date May 28, 2004 was arrived by which the work could proceed. Granting respondent time to complete the work by July 15, 2004, without any reason contract was terminated on June 04, 2004. The learned Arbitral Tribunal has therefore opined that justification by the appellant for termination was illegal. The justification was the power to levy compensation for delay, which we understand to mean that the delay occasioned by the respondent justified the contract to be terminated. But where was the delay attributable to the respondent? The appellant has no material to sustain the contention. On the contrary so strong is the evidence in the instant

case that one can safely say that it stands conclusively proved that the appellant was wholly responsible for the delay.

20. Bringing the curtains down we note that learned senior counsel for the appellant conceded to the fact that if the award is upheld concerning delay wholly attributable to the appellant and its termination being illegal, the dues determined by the Arbitral Tribunal for such claims which were fully and such which were partially allowed cannot be attacked by the appellant including rejection of the counter claim of the appellant.

21. We therefore dismiss the appeal with costs against the appellant and in favour of the respondent.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

JANUARY 22, 2016

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