

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL UNDER ARBITRATION ACT NO. 2 OF 2011**

The Board of Trustees of the Port of Mormugao, a body corporate constituted under the Major Port Trusts Act 1963, having its office at Administrative Building, Headland-Sada, Goa 403 804.

Represented in this petition by its duly constituted Attorney, Mrs. Hemangi Arsekar, wife of Mr. H. Arsekar, aged 53 years, employed, resident of Headland, Sada.

Appellant

Versus

M/s Vishal Infrastructure Ltd., a Company incorporated under the Provisions of the Companies Act 1956, having its registered office at No.1, 225/A, Anugriha Apartments, Rukmini Devi Colony, West Marredpally, Secunderabad – 500 026 and a local office at A-5, Triveni Apartments, near Vidhya Mandir, Adarsh Nagar, Chicalim, Goa – 403 711.

Respondent

Shri Yogesh V. Nadkarni with Ms. Divya Shirgam, Advocates for the Appellant.

Shri Menino Pereira, Advocate for the Respondent.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 8th FEBRUARY, 2017

PRONOUNCED ON: 14th FEBRUARY, 2017

JUDGMENT:

This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (Act, for short), challenging the

judgment and order dated 19.10.2010, passed by the learned District Judge, South Goa, Margao in Arbitration Application No. 10/2009. By the impugned judgment, the learned District Judge, has confirmed the award passed by the learned sole Arbitrator on 17.01.2009.

2. The respondent (the claimant before the Arbitrator), is a Company registered under the Companies Act and is inter-alia engaged in the business of major civil engineering construction activities. The parties had entered into an agreement dated 26.07.2001 (Agreement No. 297 of 2011), by which the contract for construction of a 100 bedded hospital at Headland Sada, was awarded to the respondent. The Work Order was issued on 10.04.2001. As per the terms of the agreement, the date of commencement was 26.04.2001 and the construction was to be completed within a period of 20 months i.e. by 25.12.2002. It is not in dispute that the actual work was completed on 07.03.2005 and thus, there was a delay of 26½ months or 806 days. It is also undisputed that in respect of part of this delay i.e. 806 days, extension was granted by the appellant.

3. As disputes and differences arose between the parties, the matter was referred to the sole Arbitrator, in which the respondent raised various claims as under:

- Claim No. 1 : Amount due in the final bill.
- Claim No. 2 : Release of substituted Bank Guarantee towards initial security deposit and refund of additional deposit.
- Claim No. 3 : Compensation for prolongation of Bank Guarantee for the initial security deposit.
- Claim No. 4 : Compensation for prolongation of Bank Guarantee for retention money.
- Claim No. 5 : Extension of time and levy of liquidated damages.
- Claim No. 6 : Extra rate for quantities of tendered items varying more than 20% of the quantities specified in the tender.
- Claim No. 7 : Compensation for increased expenses on overheads etc. incurred during the prolonged period of the contract.
- Claim No. 8 : Compensation for the increased expenses due to the prolongation period of contract for centering, shuttering and scaffolding materials.
- Claim No. 9 : Compensation for the increased expenses due to the prolongation period of contract for various machineries, tools and plants employed on the work.

- Claim No. 10 : Compensation for the increase in the prices of work done during the prolonged period of the contract.
- Claim No. 11 : Claim for interest at 18% per annum on the award amount.
- Claim No. 12 : Cost of Arbitration.

4. According to the respondent, the delay was entirely attributable to the appellant on account of which, the construction could not be completed within time, which resulted into additional expenses on overheads and escalation of price etc.

5. The claim was resisted by the appellant and the appellant raised a counter claim. It was contended that the appellant had carried out detailed analysis of the delay and the extension of time for 589 days was granted. The balance delay of 214 days is attributable to the respondent for which, the respondent is liable to pay liquidated damages at the rate of 0.5% per week, subject to a maximum of 5% of the contract value, amounting to Rs.32,68,695/-. It was contended that after adjusting the amount payable to the respondent, the respondent is liable to pay to the appellant an amount of

Rs.11,19,746/-. It was further contended that the appellant is entitled to encash the Bank Guarantee dated 05.01.2007 for Rs.11,09,000/-, issued by the State Bank of India, Bangalore.

6. The parties produced certain documents before the Arbitrator. No oral evidence was led before the Arbitrator. The Arbitrator by an award dated 17.01.2009, partly granted the claim of the respondent (excluding claim no.6, which was withdrawn as being part of claim no.1). The counter claim of the appellant, claiming liquidated damages was not granted.

7. The appellant challenged the award before the learned District Judge in an application under Section 34 of the Act, being Arbitration Application No. 10/2009. The learned District Judge has concurred with the Arbitrator, dismissing the application. Hence, this appeal.

8. I have heard Shri Nadkarni, the learned Counsel for the appellant and Shri Pereira, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the impugned award and the judgment and order of the learned District Judge.

9. It is submitted by Shri Nadkarni, the learned Counsel for the appellant that admittedly, there was a delay of 26½ months i.e. 803 days in completing the work. It is submitted that after the detailed analysis, the appellant had granted extension for 589 days as a result of which, the respondent was found to be liable for the delay of 214 days. It is submitted that the respondent was thus, liable to pay the liquidated damages as agreed between the parties. It is submitted that the Arbitrator could not have refused to grant the liquidated damages.

10. Insofar as the claim of the respondent is concerned, it is contended that the findings of the Arbitrator are vitiated being perverse and not being borne out of record. The learned Counsel has pointed out that the Arbitrator has found that in order to grant compensation, proof of loss has to be furnished by the claimant, which is not substantiated on record. It is submitted that in the face of such a finding, the Arbitrator could not have granted the compensation under various Heads.

The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of **State of Rajasthan & Another Vs. Ferro Concrete Construction**

Private Limited, (2009) 12 SCC 1 and the decision of this Court in the case of **Bharat Sanchar Nigam Limited Vs. Media Marketing Services (MMS), 2015(5) ALL MR 126, Indian Oil Corporation Limited Vs. Kadbrotee Engineering Industries, 2011(3) Bom.C.R. 145** and **Maharashtra State Electricity Board, Bombay Vs. Sterlite Industries (India) Ltd., 2000(2) Mh.L.J. 181.**

11. It is submitted that under Section 73 of the Contract Act, the compensation cannot be granted for any remote or indirect loss or damage sustained by reason of the breach. It is submitted that such compensation can be granted only where the party shows that it has sustained loss due to the breach of the contract. It is submitted that unless the respondent (claimant) shows that it has suffered loss, no claim could have been granted by the Arbitrator. It is submitted that the learned District Judge failed to correct the error committed by the Arbitrator.

12. On the contrary, it is submitted by the learned Counsel for the respondent that the Arbitrator has rightly granted the claim. It is submitted that admittedly, on their own

saying the appellant had carried out the evaluation of the delay and granted extension for 589 days. Thus, the learned Arbitrator has rightly come to the conclusion that 75% of the delay was not attributable to the respondent. It is submitted that the Arbitrator has further bifurcated this 75% in two parts and has held that 50% of this delay (out of 75%) was attributable to the appellant and the remaining 50% was on account of reasons beyond the control of both the parties and thus, held that the delay attributable to the appellant was 37.5%. It is thus submitted that the findings recorded by the Arbitrator cannot be said to be perverse, as they are based on the appreciation of the circumstances and the material on record. It is pointed out that the respondent had placed on record the quotation from a local supplier to support their claim towards daily hire charges. It is submitted that the scope of interference in the award of the Arbitrator is limited. It is submitted that once, a substantial part of the delay was found to be attributable to the appellant, the claim for liquidated damages, has rightly been rejected.

13. I have carefully considered the rival circumstances and the submissions made. In this case, the claim originally

made was subsequently revised, out of which, the Arbitrator has granted claim under certain Heads only. The claim granted under some of the Heads is not disputed. It would therefore be worthwhile to set out the details as under:

Claim No.	Details	Claim before the Arbitrator	Revised Claim	Amount Awarded	Amount disputed in Present Appeal
1	Amount due in final bill	Rs.69,21,431/-	Rs.59,89,492/-	Rs.33,21,622/-	Rs.80,000/-
2	Release of BG towards initial security deposit and refund of additional deposit	Release of BG for Rs.11,09,000/- and refund of Rs.10,746/-	-	Release of BG for Rs.11,09,000/- and refund of Rs.10,746/-	Not disputed
3	Compensation for prolongation of BG for initial security deposit	Rs.3,35,321/-	Rs.3,26,144/-	Rs.2,25,792/-	Ought to have been awarded only Rs.1,69,344/-
4	Compensation for prolongation of bank guarantee for retention money	Rs.3,17,906/-	Rs.2,25,792/-	Rs.2,25,792/-	Ought to have been awarded only Rs.1,69,344/-
5	Liquidated damages (Counter Claim)	-	-	Levy of liquidated damages by the MPT bad in law and void	MPT entitled to liquidated damages of Rs.31,72,799/-
6	Extra rate for quantities	Rs.34,12,346/-	This claim was withdrawn as the items form part of claim no.1	-	-
7	Expenses on overheads for prolonged period	Rs.78,17,500/-	-	Rs.29,31,560/-	Full amount disputed

8	Expenses during prolongation period for centering, shuttering and scaffolding	Rs.31,48,200/-	Rs.21,07,350/-	Rs.7,90,250/-	Full amount disputed
9	Expenses during prolongation period for machineries, tools and plants	Rs.52,74,000/-	Rs.39,15,000/-	Rs.14,68,125/-	Full amount disputed
10	Increase in prices of work during prolonged period	Rs.1,16,88,417/-	Rs.28,29,259/-	Rs.10,60,970/-	Not disputed
11	Claim of interest	18% p.a. from the date of taking over possession of completed work	-	12% p.a. from date of letter detailing the claims viz. 25/09/2006 till date of award and further 12% p.a. till date of payment	Not disputed
12	Cost of Arbitration	-	-	To be shared by the parties	-
Counter claim of the respondent	Levy of liquidated damages	Rs.32,68,695/-	-	Claim rejected	Full amount disputed

14. It can thus be seen that claim no.6 was withdrawn as being part of claim no.1. The appellant has not disputed claim nos.2,10 and 11. The claim no.12 (about cost of litigation), has been directed to be shared equally and thus, does not survive for consideration. Thus, the challenge in this petition is confined

to claim nos.1,3,4,5,7,8,9 and the rejection of the counter claim.

15. Insofar as the claim no.1 is concerned, the Arbitrator has awarded an amount of Rs.33,21,622/-. The only contention is that this is in excess by Rs.80,000/-. The learned District Judge has found and to my mind rightly so, that on perusal of para 16.2 of the award, the Arbitrator has found that in respect of two items, namely, V/8 (d) and V/8 (e), no payments were made, though these items were put to use. Thus, the contention raised on behalf of the appellant, to my mind has rightly been negated by the learned District Judge.

16. Insofar as claim nos.3 and 4 are concerned, it is towards extension of the Bank Guarantee in respect of which, as against the revised claim of Rs.3,26,144/-, the Arbitrator has awarded Rs.2,25,792/-. The contention is that the Arbitrator should have awarded only Rs.1,69,344/- in respect of each of the two Bank Guarantees. I have gone through paras 16.4 and 16.5 of the award of the Arbitrator and para 9 of the judgment of the learned District Judge and I do not find that any case for interference is made out. As noticed earlier, it has come on

record that out of the total delay, the appellant had extended the period by 589 days and the respondent was required to get the Bank Guarantee extended. In such circumstances, the contention on behalf of the appellant, insofar as claim nos.3 and 4 is concerned, to my mind cannot be accepted.

17. This takes me to claim no.5, which is about extension of time and levying of liquidated damages. The said claim can be considered alongwith the counter claim lodged by the appellant as they are co-related. The stipulated date for completion of the contract was 25.12.2002. The actual date of completion was 07.03.2005, resulting into delay of 803 days. The respondent had applied for extension of time on 20.12.2002 i.e. five days before the original stipulated date for completion. There was no response from the appellant till 08.03.2005, when the respondent informed that the work was completed by them. It was only on 14.06.2006 that the appellant informed the respondent that the extension of the time was granted to him, only till 05.08.2004 and has levied liquidated damages for 214 days (which delay according to the appellant was attributable to the respondent). The learned Arbitrator has further noticed that as per the detailed analysis carried out by the appellant, there

was delay in supply of steel, working drawings etc. and certain amount of delay was on account of other contractors namely, electrical, air conditioning, internal finishing, solar heating, medical gas pipeline installation etc, interfering with the main civil engineering work. In these circumstances, the learned Arbitrator has found and to my mind rightly so, that it was the appellant who had committed the breach of contract and hence, the action of levying liquidated damages was bad in law and not substantiated. This finding has rightly been confirmed by the learned District Judge and no interference is called for.

18. This takes me to claim nos.7,8 and 9, which can be taken up together. Before considering the individual claim, it would be worthwhile to notice the methodology adopted by the learned Arbitrator, which is common to all these claims. The Arbitrator has found that out of total delay of 803 days, the delay attributable to the respondent was 214 days, which approximately works out to 26.5% i.e. 25%. Insofar as the balance 75% of the delay is concerned, the Arbitrator has found that it was attributable to (i) the appellant and (ii) was on account of reasons beyond the control of both the parties. The Arbitrator has apportioned this 75% equally to the appellant and

towards reasons beyond the control of both the parties. Thus, the Arbitrator has found that the delay attributable to the appellant was 37.5%. This is the common factor applied by the learned Arbitrator, while granting compensation under claim nos.7,8 and 9.

19. The contention on behalf of the appellant as regards claim nos.7,8 and 9 is that the said claims have been granted, without there being any proof of the respondent having sustained such loss or having incurred additional expenses. There cannot be any manner of dispute that in addition to the factum of breach of contract, the claimant is expected to show loss, which is the direct and proximate result of such breach. The Hon'ble Apex Court in the case of **Ferro Concrete Construction Private Limited** (supra) has held in para 55 of the judgment that, while the quantum of evidence required to accept a claim may be a matter within exclusive jurisdiction of the Arbitrator to decide, however, if there was no evidence at all and if, the Arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement "without nothing more", it has to be held that the award on that account would be invalid. This judgment has been relied upon

by this Court in the case of **Bharat Sanchar Nigam Limited** (supra), in which it has been held that apart from the wrongful termination of the contract, the claimant has to establish the quantum of compensation and there is no automatic award of the compensation, even if, there is a finding of wrongful termination. A Division Bench of this Court in the case of **Sterlite Industries (India) Ltd.** (supra) has inter-alia held that the quantum of compensation is linked with loss or damages that result from breach of contract and where no loss or damage is ensued, there would be no question of awarding compensation. It has been held that Section 73 of the Contract Act does not give any cause of action unless and until damages are actually suffered, otherwise Section 73 will become nugatory and the party would be penalised though the other party has suffered no loss.

It can thus be seen that although, the quantum of evidence required to accept a claim, would be a matter within the jurisdiction of the learned Arbitrator, a case of no evidence, would stand on a different footing. The question would evidently depend upon facts and circumstances of each case.

20. Let us now see the individual claims. Claim no.7 refers to expenses on overheads due to prolonged period of the contract. The claim made was Rs.78,17,500/-. A careful perusal of para 16.8 of the award of the Arbitrator would show that the Arbitrator has inter-alia considered the law of Engineering Contracts by G.T. Gajaria, Building and Engineering Contracts by Hudson and the audited balance sheets for the years 2002, 2003, 2004 and 2005. However, the learned Arbitrator has refused to grant the entire amount of compensation as claimed, but has restricted it to 37.5% (as set out above) i.e. Rs.29,31,560/-.

21. Thus, this would not be a case of there being no evidence in support of claim no.7, unlike claim nos.8 and 9, to which I will advert a little later. The Arbitrator after considering the material has proceeded to award the compensation, restraining it to 37.5%. The finding of the Arbitrator, which is based on the material produced on record and confirmed by the learned District Judge, in my considered view, is not amenable to any interference.

22. This takes me to claim nos.8 and 9. Claim no.8 is in respect of compensation for increased expenses towards centering, shuttering and scaffolding materials on account of prolongation of the contract, while claim no.9 is in respect of increased expenses on account of the extended period, for which the machineries, tools and plants were required to be deployed on the work. These two claims have been dealt with by the learned Arbitrator in paras 16.9 and 16.10 of the award and the reasoning is identical. In respect of both these claims, the Arbitrator has categorically come to the conclusion that there is no documentary proof furnished in order to grant compensation and proof of loss has to be furnished, which is not available on record. It is true that the Arbitrator has noticed that the respondent has produced a quotation for daily hire charges from a local supplier, however, the further part of the reasoning and the finding recorded by the Arbitrator would clearly indicate that the same has not been accepted, otherwise, the Arbitrator would not have come to the conclusion that the proof of loss is not "available on record". Thus, once the Arbitrator has found that the proof of loss has to be furnished, which was not furnished, the compensation under these two claims, could not have been granted.

23. I am conscious of the limited interference available in the matter of challenge to Arbitral award. The interference available under Section 34 of the Act is limited and the scope of appeal under Section 37 of the Act would be further limited. However, as noticed earlier, where the Arbitrator himself comes to the conclusion that there is no proof of loss, the grant of compensation would be clearly vitiated, which would require interference.

24. For the aforesaid reasons, the following order is passed:

ORDER

- (a) The appeal is partly allowed.
- (b) The impugned award to the extent of grant of claim nos.8 and 9, is hereby set aside.
- (c) The rest of the award stands confirmed.
- (d) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.