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

Reserved on: January 02, 2017
Date of Decision: February 16, 2017

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O.M.P. 427/2007

ENGINEERING PROJECTS (INDIA) LTD. & ANR. Petitioners
Through: Mr. Rajiv Shankar Dwivedi, Ms. Shweata Mishra Jain & Mr. Vivekananda Jha, Advocates for Petitioner No.1.
Mr. S.K. Chandwani, Advocate for Petitioner No.2.

versus

UNITECH LIMITED Respondent
Through: Mr. S.K. Maniktala & Mr. Swetab Kumar, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

16.02.2017

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1. Engineering Projects (India) Limited ('EPIL') has in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') challenged an Award dated 7th March, 2007, passed by the sole Arbitrator in the disputes between EPIL and the Respondent, Unitech Limited ('Unitech'), arising out of an Agreement dated 29th July, 1993 between the parties whereby the work of 'Modernisation of Air Traffic Control Services, Construction of Technical Building, Control Tower, Utility Blocks and Allied Works at Bombay Airport' was awarded to Unitech.

2. Petitioner No. 2 is the Airports Authority of India ('AAI'), earlier known as the National Airports Authority, had appointed EPIL as their legal assignee for the aforementioned work. The total contract value was Rs.12.70 crores. The case of EPIL is that in undertaking the above work, it was acting only as an agent of AAI in terms of the preamble to the Agreement, which noted that EPIL would be the "legal assignee" of AAI for the above work. It is further pointed out that in the Agreement AAI is described as the 'owner' and EPIL as the 'assignee', which make it clear that the work was for the benefit and use of AAI. It is pointed out further that AAI was also a party to the arbitration for which Respondent No. 2 was appointed as the sole Arbitrator. The preliminary objection of EPIL was examined by the sole Arbitrator notwithstanding that the High Court in its order dated 24th September, 2003 held that AAI was a necessary party to the arbitration. The learned Arbitrator held that AAI was, in fact, a necessary party and the Award could be passed against both EPIL and AAI holding them jointly and severally liable.

3. The plea of EPIL that no liability could be attached to EPIL since the fact of it being an agent of AAI was disclosed in terms of Section 230 of the Indian Contract Act, 1872 ('ICA') was not accepted by the learned Arbitrator. It was further noted that as regards the present agreement, the assignee was "in reality the agent." However, it was held that "the safe course is to implead both parties to the contractor's claim for a complete and effective adjudication."

4. There were 15 claims filed by Unitech in the arbitration proceedings.

There were seven counter-claims filed by EPIL and AAI. Of the above claims, the learned Arbitrator partly awarded Claim Nos. 1, 2, 5, 11 & 13 of Unitech in the total sum of Rs. 2,21,75,402.03. Further, interest at 15% per annum in the sum of Rs. 2,57,78,905 was awarded. This was jointly and severally against EPIL and AAI.

5. In the petition it is stated that AAI, for whom EPIL got the contract work done, had decided to limit the objection to the impugned Award in respect of Claim Nos. 2 & 5 awarded by the Arbitrator. Further, the component of interest awarded at 15% per annum is objected to as being “highly exorbitant and contrary to substantive law.”

6. Claim No. 2 was for payment due by way of escalation bills in the sum of Rs.1,23,82,609.77 together with interest thereon at 24% amounting to Rs. 2,04,60,820.52.

7. The case of EPIL and AAI was that escalation as per the contract was payable only up to the last date of the scheduled date of completion of work, which was 30th November, 1994. Unitech had been seeking extension of time (‘EOT’) and ultimately completed the work only on 31st March, 1996. It was submitted that with the delay in completion of the work having been caused by Unitech itself, it had no right in law to claim escalation. It was further pointed out that escalation up to 30th November, 1994 i.e., the scheduled date of completion, was already paid to Unitech. In particular, reference was made to the following Clauses of the General Conditions of Contract (‘GCC’):

“Clause 13(3) of GCC of the contract

Request for extension of time, to be eligible for consideration, shall be made by the Contractor in writing within fourteen days of the happening of the event causing delay. The Contractor may also, if practicable, indicate in such a request the period for which extension is desired.”

“Clause 32 of GCC of the contract

If the contractor fails to maintain the required progress in terms of condition 13 or to complete the work and clear the site on or before the contract or extended date period of completion he shall, without prejudice to any other right or remedy of EPI on account of such breach, pay as agreed compensation amount calculated as stipulated below or such smaller amount as be fixed by the authority mentioned at serial 26 in Schedule B on the contract value of the work for every week that the progress remains below that specified in condition 13 or that the work remains incomplete.”

8. It was, accordingly, submitted that for every EOT a written request was required to be made by Unitech and it was to be granted by the Engineer-in-Chief. The first extension was granted up to 30th June, 1995 by the letter dated 24th November, 1994. The second extension was granted up to 30th September, 1995 by the letter dated 26th July, 1995. Each time the EOT was granted, EPIL reserved the right under Clause 32 of the GCC to levy liquidated damages (LD). According to EPIL, it was clear that the delay was on account of non-mobilisation of adequate resources and unsatisfactory work.

9. At one point in time by the letter dated 25th August, 1995, EPIL terminated the contract and claimed compensation of Rs. 98.25 lakhs from Unitech. This was challenged by Unitech before this Court but due to the

intervention of the Ministry of Heavy Industries, the work was allowed to be resumed and the petition was withdrawn.

10. As a result of the above developments, a third EOT was granted up to 31st December, 1995 by the letter dated 4th October, 1995. Here again, EPIL reserved its right to levy LD. It was stated in the letter as under:

“Extension of time for completion of the above mentioned work is granted up to 31st December, 1995 without prejudice to the rights of EPI/AAI to recover the compensation for delay in accordance with the provisions of Clause 32 (vide page 52) of the said agreement dated 29th July, 1993.”

11. As it turned out, the work could not be completed even by the third extension. A joint meeting was held between EPIL, AAI and Unitech for a further extension “without financial implications on either side.” The fourth extension was granted up to 31st March, 1996.

12. According to EPIL, there were as many as 118 documents placed before the Arbitrator which were not examined by him and which would go to show that it was Unitech which was responsible for the delay in completion of work. A synopsis of six such documents has been set out in para 19.13 of the petition. The understanding of EPIL was that inasmuch as Unitech in its letter dated 18th January, 1996 sought extension for the fourth time, it stated that it was seeking it “without financial implications on either side” thereby meaning that Unitech was proceedings on the mutual understanding that no escalation would be claimed even by Unitech.

13. Reference is made by EPIL to the letter dated 18th January, 1996 (Exhibit R/5/8) seeking extension of time up to 30th April, 1996 “without

financial implications on either side” and a further letter written by EPIL to Unitech (Exhibit R/5/9) granting EOT up to 31st March, 1996, again, “without financial implications on either side.” In para 11 of the affidavit of Mr. C. Gandhi Rao, the above expression used in the two letters was taken to mean as “no extra financial burden on either side on account of the fact the work under contract having been prolonged beyond 30.11.1994 and both the sides shall not insist upon the extra financial burden suffered on account of work having been delayed and prolonged beyond 30.11.1994.” It is stated that it was only on account of the above expression that EPIL did not press for its claim of Rs. 98.25 lakh as LD.

14. It is further contended by EPIL that the claim of escalation was barred by limitation. It is submitted that the request for EOT was made first on 15th November, 1994 and should be construed as the starting point for the claim for escalation. Even if it was taken to be 1st April, 1997 i.e., the date of the presentation of final bill, the claim would still be barred. Even if the date was taken as 31st March, 1999 i.e., the date on which the Engineer-in-Charge declined to certify the claim, it would still be barred by limitation. In this context, it is contended that the payment of Rs. 20 lakh by EPIL to Unitech on 15th April, 2000 was made not as part payment but “towards part of the certified amount of Rs. 37 lakh and odd payable to the Contractor as certified by the Engineer-in-Charge on the final bill on 31st March, 1999.” It is further pointed out that the balance under the final bill in the sum of Rs. 18 lakh referred only to “that part of the payment was left to be paid.” There was no acknowledgement of debt of EPIL to Unitech at any point in time.

15. The case of Unitech, on the other hand, is that the scope of interference by this Court under Section 34 of the Act is limited. This Court is not sitting as a court of appeal and cannot substitute its own opinion for that of the Arbitrator. The high threshold of demonstrating that there is an error apparent on the face of the record has not been made in the present case. A reference is made to the decisions in ***Union of India v. Rallia Ram AIR 1963 SC 1685***; ***State of Orissa v. Kalinga Construction Co. (P) Ltd. 1970 (2) SCC 861***, ***Hindustan Iron Co. v. K. Shashikant & Co. AIR 1987 SC 81***; ***Municipal Corporation of Delhi v. M/s. Jagan Nath Ashok Kumar AIR 1987 SC 2316***. Reference is also made to the decisions in ***U.P. Hotels v. U.P. State Electricity Board AIR 1989 SC 268***; ***Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises (1999) 9 SCC 283***; ***Sudarshan Trading Co. v. Government of Kerala (1989) 2 SCC 38*** and ***Olympus Super Structure Pvt. Ltd. v. Meena Vijay Khetan AIR 1999 SC 2102***.

16. It is further submitted by Unitech that an agent would also be liable to be sued for breach of non-performance in its personal capacity when an agent enters into a contractual undertaking to perform such obligations. This is without prejudice to the contention that EPIL is not, in fact, an agent of AAI. It was only an assignee which has very different legal consequences. It is further submitted by Unitech that the aspect of limitation has been examined in detail by the learned Arbitrator and he has given a factual finding against EPIL and AAI. Having explained the impugned Award in respect of claim Nos. 1, 11 and 13 while rejecting a similar plea of limitation, it was not open to the Petitioners to agitate the issue of limitation only in respect of claim

Nos.2 and 5.

17. It is denied by Unitech that the delay in execution of work was due to omission and commission on the part of Unitech. On the other hand, it is claimed that it is EPIL and AAI who were responsible for such delay. No LD was levied during the grant of each of the EOTs. The retention money was released and the bank guarantees ('BGs') were also discharged. In the circumstances, Unitech could not be characterised as a defaulter at all.

18. The above submissions have been considered. The aspect of limitation has been examined at great length by the learned sole Arbitrator. In the first place, the learned Arbitrator concluded that "I am of the view that the amount of Rs. 18,23,172.60 remains due to the claimant on the strength of the final certificate which has not been disputed by any of the parties before me." The learned Arbitrator found that in none of the letters of EPIL was there any reference to "documents to be submitted or for removal of defects." It was noted that Unitech was repeatedly writing for the balance amount and the only answer given by EPIL was that "they were pursuing the matter with the Head Office and that the claimant should "bear with us"". The Arbitrator has discussed in detail several letters exchanged between the parties. It is on the above basis that Claim No. 1 was, in fact, allowed.

19. As regards Claim No. 2, the learned Arbitrator again examined at great length the purport of the expression "without financial implication on either side", which was used in the last letter of grant of EOT. There were four occasions for grant of EOT but the fourth and last extension was granted "without financial implication on either side." The analysis and reasoning of

the learned Arbitrator in para 47 of the impugned Award, reads as under:

“47. In order to understand the meaning of these words we have to see the facts and circumstances in which they were used. We will see the background and the commercial context in which these words were employed. They had a meaning. Not that they are meaningless. The words have to be interpreted in its contractual matrix. In the commercial contract according to business common sense we give meaning to these words. The employer waived his right to levy liquidated damage while granting 4th extension. The contractor waived his right to claim delay damages for the period from January 1996 to March 1996. There was thus a give and take on both sides. This was a package deal. But it related only to the 4th extension and had nothing to do with the first three extensions in respect of which escalation is claimed. As I have said the contractor in the 4th extension cannot be refused escalation merely because he himself asked for extension to be given “without financial implications on either side.” These words mean that beyond the contractual entitlements, the employer and the contractor will not claim any other amount.”

20. The learned Arbitrator thus concluded that up to 30th November, 1994 no escalation was payable by EPIL. However, for the quarter of October, 1994 to December, 1994 for which bill No. 5 was raised, it was held that Unitech was entitled to escalation for the month of December, 1994. For the above period from December, 1994 onwards that escalation was allowed. It is only to that extent that Claim No. 2 was allowed.

21. Coming to the question of limitation, the learned Arbitrator has relied on the minutes of the meeting held on 18th January, 1996, which recorded the promise of EPIL to pay the contractor's bill and escalation strictly as per the formula in the contract. Further “the correspondence is replete with promises to pay. Payment of Rs. 20 lakh was also made in 2000.” A specific finding

recorded in this regard was that the letters of EPIL contained “promises after promises to pay throughout the length of seven years or so.” Unitech had agreed to complete the miscellaneous and additional works by 31st March, 1996 and it was not, as pointed out by the learned Arbitrator, “free work.” There was no slackness on the part of Unitech in pursuing its claims. It is further noted by the learned Arbitrator in para 59 of the Award as under:

“59... When at the written request of the debtor the creditor waits for payment to be made this by itself is an acknowledgement of indebtedness and will extend the limitation. In this case this accommodation went on for a period of seven years and each letter of EPI is an acknowledgement within the meaning of Section 18 of the Limitation Act. There was an admission that the writer owed the debt. This was an acknowledgement. It was an admission by the writer that there is a debt owing by him to the contractor. The various writings of EPI amount to acknowledgement of liability and the contractor is entitled to get the benefit of the same. At no point of time there was denial or repudiation of the claim which would have compelled the contractor to go to law and sue for his claims. All through we find accommodation, acknowledgement and intention to pay.”

22. Having considered the submissions of learned counsel for the Petitioners and again having gone through the entire correspondence placed on record in the light of the above reasoning and conclusions of the learned Arbitrator, the Court is not persuaded to hold that the claims of Unitech were barred by limitation.

23. The learned Arbitrator has noted significantly that merely because nothing in the office file is to the effect that Unitech was not entitled to extra claims did not mean that the claims had become barred by time. The rejection of the claim was not notified to Unitech. The final bill had been submitted in April 1997 i.e., one year after the work was actually completed

on 31st March, 1996. Mr. C. Gandhi Rao, the Project Engineer, certified the payment of Rs. 38,94,464 on 22nd April, 1999. Against this certified amount Rs.20 lakh was paid on 15th April, 2000. The balance amount forms subject matter of claim No. 1, which was allowed by the learned Arbitrator. Reference was made to the correspondence between the parties and, in particular, to the reply of EPIL dated 3rd July, 2002 stating that “only after then fresh funds were made available to us by AAI.”

24. The learned Arbitrator focused on the words “bear with us” used by EPIL in the aforementioned letter and concluded that not only was there no refusal to pay, there was an acknowledgement throughout. The learned Arbitrator then focused on Clause 52 of the Contract and concluded that “there was a subsisting liability which indicated the existence of jural relationship of debtor and creditor and there was intention to admit this jural relationship in express terms.” The learned Arbitrator also examined the issue of limitation from the aspect of Article 137 of the Limitation Act. Even for the claims for extra additional works, the learned Arbitrator found that no payment had been made within six months of the undisputed portion of the final bill. The payment of Rs. 20 lakh was made in the year 2000 i.e., more than three years after the bill was submitted. It was concluded that no decision in respect of extra items was taken or communicated to Unitech.

25. The Court is not persuaded to hold that any part of the above reasoning is erroneous. A careful perusal of the Award does show that the documentary evidence produced by EPIL in the form of a compilation has, in fact, been very carefully analysed by the sole Arbitrator.

26. Likewise, the conclusion that both EPIL and AAI are jointly and severally liable to Unitech is after analysing the various Clauses of the Contract and in light of the correspondence between the parties. The finding was that no management services were being rendered by EPIL to Unitech. However, as far as the contract in question was concerned, it did not mention that phrase. Likewise, the expression “deposit work” also did not find mention in the Agreement dated 29th July, 1993. The minutes of the meeting dated 10th May, 1994 and 20th September, 1994 also do not spell out the rights and liabilities of AAI. No payment was directly received by Unitech from AAI. Therefore, the factual finding of the learned Arbitrator to the above effect suffers from no infirmity warranting interference.

27. Coming to the merits of Claim No. 2 which was on account of escalation in respect of labour and material as per the given formula in Clause 53 of the GCC. This was for the period 1st December, 1994 to 31st March, 1996 during which the contract period was extended validly. Clause 53.1 of the GCC provided for payment of such escalation and reads as under:

“53.1 If the prices of materials (not being materials supplied or service rendered at fixed price by the department in accordance with Clause 15(b) and 14 hereof) and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provision detailed below and the amount of the contract shall accordingly be varied, subject to the condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract including such period for which the contract validity extended under the provisions of Clause 13.4 of the contract without any action under Clause 32 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of

completion is twelve months or less.

Such compensation for escalation in the prices of materials and labour when due shall be worked out based on the following provisions:”

28. The reasons furnished by Unitech for grant of EOT at every stage were never denied or refuted by EPIL.

29. As regards the entitlement to escalation, the minutes of the meeting dated 18th January, 1996 recorded as under:

“EP (I) L stated that such escalation was payable upto the extended date of completion. It was decided to release escalation strictly as per the formulas stipulated in the contract.”

30. The conclusion of the learned Arbitrator that Unitech never waived its entitlement to escalation for the validly extended period appears to be correct and consistent with the evidence that has come on record. The evidence of Mr. C. Gandhi Rao, the Engineer-in-Charge showed that he had already processed and verified escalation bill No. 6, which was for the period subsequent to the stipulated contractual date of completion i.e., 30th November, 1994. This happened on 18th January, 1996. In para 5 of the inter-office memo prepared pursuant to the above procession of the final bill which was forwarded to the Head Office, it was indicated that till that time the previously approved escalation bills had not been released for further ‘necessary action’ at the Head Office. This has been considered by the sole Arbitrator in allowing claim No. 2 in favour of Unitech.

31. Reliance placed by learned counsel for the Petitioner on the decision dated 25th March, 2015 in OMP No.249/2013 titled *National Highways*

Authority of India v. Bumi Hiway (M) SDN BHD is misplaced. All that was held in the said case is that some basic materials had to be placed on record to demonstrate loss of profit. However, in the present case, that question did not arise. The question was only about not paying the amount in terms of the bill that was processed and consistent with the Clauses of the contract. Consequently, the challenge in respect of the impugned Award as regards Claim No. 2 is hereby negated.

32. Now turning to Claim No. 5, the central plank of the submission of the counsel for the Petitioners is that despite the claim having been given up by Unitech and this fact being noted by the learned sole Arbitrator, he proceeded to decide it on merits. Claim No. 5 was for Rs. 68,09,720.09 on account of loss of overhead due to under-utilization of resources of Unitech specifically mobilised/earmarked for the project in question. The learned Arbitrator noted that Schedule E Item 14 of the Contract provided for 15% towards overheads and profits. Unitech had bifurcated the same as 10% towards overheads and 5% towards profits. The learned Arbitrator took the two at par and bifurcated them at 7 ½% each and allowed only 7 ½% i.e., in the sum of Rs. 68,09,720.09 and, therefore, as against the claimed sum, the aforementioned amount was allowed.

33. Learned counsel for the Petitioners referred to the written submissions of Unitech before the learned Arbitrator in this regard. Indeed, the Court finds that on 17th December, 2006, a gist of arguments was filed on behalf of Unitech “with respect to its Claim Nos. 2, 4, 11 & 13 and Preliminary Objections of the Respondent-EPI” and there is no whisper in this entire

submission to claim No. 5 at all. The averment made in para 21.1(c) of the petition has been answered by Unitech as under:

“(c) This ground is not at all tenable in view of the pleadings exchanged between the parties which show that this ground is being agitated by the petitioner just for the sake of it. In any case, such hypertechnical consideration cannot come in the way of grant of this claim. It is again submitted that the said claim was raised at the first instance itself and was specifically pleaded before the learned sole arbitrator. The respondent has also opposed the said claim by filing its detailed reply/response thereto. The claim was argued before the learned sole arbitrator. Merely because written submissions in respect thereof were not filed, it cannot be said that the learned Arbitrator could not have entertained the said claim or that the said claim was not pursued by the claimant. It is pertinent to note that the claimant (respondent No. 1 herein) had never withdrawn its said claim. The pleas and contentions of the petitioner to this effect are factually erroneous. Written arguments were filed only in respect of some of the claims and not all the claims.”

34. The above submissions have been carefully considered. It is a plausible contention that written submissions were filed only with respect to some of the claims. Significantly, it is pointed out that even in respect of Claim No. 1, no written submissions were filed and yet that claim was allowed and not challenged by EPIL. This appears to be factually correct. As noted, the two submissions did not advert to Claim No. 1 as well.

35. The Court is unable to conclude that Unitech had actually given up claim No. 5. In the absence of any documents expressly stating so, it is not possible to infer that Claim No. 5 had been given up.

36. Turning to the impugned Award, the Court finds that the extent to which the learned Arbitrator has allowed Claim No. 5 is fully supported by cogent

reasons. The following discussion in the impugned Award is relevant:

“220. In this case the Contractor could not get the working space without interference. He was hindered by the security regulations and by the work of other agencies. It was not a hindrance free site where the work was to be carried out and therefore, could not be completed within the stipulated period. Drawings, designs and instructions were also not given in time. There was a change in the scope of work. Additional work was ordered. Extras were ordered. Technical specifications were changed. All these were listed in the applications for extension of time.

221. In the overall scenario, the overrun period dominates the scene. There were delays. As a result there was delay caused expense and the price rise with it. The contractor has made his claim on the basis of overheads. Overheads are nothing but operating costs.”

37. The learned Arbitrator considered Hudson’s formula as well as the decision in *Mc Dermott International Inc. v. Burn Standard Co. Ltd. JT (2006) 1 SC 376*. The Court does not find any error in the impugned Award of the learned Arbitrator either in the appreciation of evidence or the analysis or conclusions reached. The Court is not persuaded to interfere with the impugned Award with respect to Claim No. 5.

38. As regards the Award of interest as against 24% per annum claimed by Unitech, the learned Arbitrator has awarded 15% both pre-reference *pendente lite* and future interest. As pointed out in *Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd. (2005) 6 SCC 462* where 18% interest was granted, the decision to Award 15% interest in a commercial contract can hardly be said to be excessive.

39. As regards the dismissal of counter-claims, the learned Arbitrator has

found factually that each of them was barred by time. They were filed only on 5th June, 2004 i.e., long after the statement of claims had been filed. No ground has been made out for interference even with that portion of the Award.

40. For the aforementioned reasons, the Court finds that no ground has been made out to interfere with the Award in respect of Claim Nos. 2 & 5, the claim towards interest and the dismissal of the counter claims.

41. The petition is, accordingly, dismissed but in the circumstances, with no orders as to costs.

FEBRUARY 16, 2017

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S. MURALIDHAR, J.