

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 09.01.2017

+ **O.M.P. (COMM) 277/2016**

PAWAN HANS HELICOPTERS LIMITED

..... Petitioner

versus

IDEB PROJECTS PRIVATE LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Dhruv Dewan, Mr Rohan Batra and
Mr Kostubh Devani.

For the Respondent : Mr Neeraj Sharma, Mr Alok Tiwari,
Mr Ravindra Prasad, Mr Adhish
Rajvanshi, Mr Anchit Tripathi.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Pawan Hans Helicopters Ltd. (hereafter 'PHHL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for partially setting aside the arbitral award dated 03.02.2016 (hereafter 'the impugned award') - as corrected on 09.04.2016- passed by the Sole Arbitrator, Justice R.C. Lahoti (Retd.). The impugned award was made in respect of the disputes raised by the respondent, IDEB Projects Pvt. Ltd. (hereafter 'IDEB'), in relation to an agreement dated 01.09.2004 entered into between the parties for construction of PHHL's office complex building at Noida.

2. PHHL, a Government of India enterprise, is the national helicopter company of India primarily engaged in providing helicopter support services to the oil sector for offshore exploration operations; air transport services in remote and hilly areas; and charter services for promotion of tourism. In the month of March 2004, PHHL invited bids for construction of its office complex building at Plot no. C-14, Sector 1, Noida, Uttar Pradesh (hereafter 'the office building'). IDEB's bid being the lowest was accepted and the same was communicated by PHHL by its letter dated 05.08.2004. Subsequently, the parties entered into a Contract dated 01.09.2004 (hereafter 'the Agreement'). In terms of the Agreement, the construction was to be completed by 10.09.2006. The Agreement was an '*item rate variable price*' contract. The initial indicative price as per the Bill of Quantities (BoQ) annexed with Tender Documents was ₹5,72,16,152/-.

3. According to PHHL, the execution of the Agreement was delayed and the delays were solely attributable to IDEB. This led PHHL to initially extend the completion date of the Agreement on four occasions, upto 31.01.2009. It is PHHL's case that due to delays on IDEB's part, PHHL suffered severe financial hardships. As a result, disputes arose between the parties.

4. By way of a letter dated 07.10.2008, IDEB invoked the arbitration clause and sought appointment of an arbitrator to adjudicate the disputes that had arisen between the parties. In pursuance thereof, Justice K D Bali (Retd.) was appointed as a sole Arbitrator and he entered upon the reference on 15.11.2008. Thereafter, the Agreement had to be extended on further three occasions, upto 31.10.2009.

5. In or around April 2010, PHHL took the possession of the office building in an unfinished state. Thereafter, PHHL called upon IDEB to rectify certain defects in the construction of the office building on various occasions. However, PHHL claims that IDEB abandoned the works in June 2010 without fulfilling its obligations and, therefore, PHHL had to appoint another agency to complete the pending work. During the pendency of the arbitration proceedings, IDEB issued another notice dated 17.09.2012 invoking arbitration, seeking reference of certain additional disputes that arose during the period 2009-2010. The arbitration proceedings in respect of the aforesaid notice dated 17.09.2012 are currently underway under the aegis of the Delhi International Arbitration Centre (DIAC).

6. Owing to ill health, Justice K D Bali (Retd.) resigned as an Arbitrator in April 2013 and Justice R C Lahoti (Retd.) was appointed in his place. Before the Arbitrator, IDEB filed a Statement of Claim claiming an aggregate amount of ₹3,79,58,085/- along with *pendente lite* interest at the rate of 18% p.a. in addition to costs as under :-

SI No.	Claim	Amount (₹)
1.	Reimbursement of Works Contracts Tax	22,88,646.08
2.	On Site Overheads and Off Site Overheads	68,21,925.00
3.	Compensation on account of increase in cost of Materials	1,49, 13,032.73
4.	Loss of Productivity from Tools and Plants	83,24,637.00
5.	Interest on Delayed Payment	6,25,475.26

6.	Refund of Interest Charged on Mobilization Advance in contravention of the contractual provision	8,48,876.40
7.	Loss of Profit	41,75,752.00
8.	Interest on Borrowings, Margin Money of Bank Guarantees/ Performance Guarantees/ Security Deposits, etc.	29,49,750.00
9.	TOTAL	3,79,58,085.15

7. PHHL also filed its counter claims *inter alia*, with respect to liquidated damages, penalty paid to NOIDA Authority for delay in completing the construction of the office building and rent paid by PHHL for the premises occupied by it instead of the office building.

8. Insofar as the claim for reimbursement of Works Contract Tax was concerned, the same was rejected as it was found that in terms of the Agreement, IDEB had accepted full and exclusive liability for all taxes and duties levied by the Central or State Government.

9. The Arbitrator also observed that the initial four extensions that were granted – extensions upto 31.01.2009 – constituted the subject matter of the present arbitral proceedings and not the extensions granted after that. Further, it was observed that the four extensions when granted did not reserve any right in favour of PHHL to levy liquidated damages for the said period. He also found that PHHL had repeatedly committed breach of the Agreement by failing to fulfil its obligations as stipulated under the

Agreement and therefore, IDEB was entitled to claim damages from PHHL on the basis of expected profit of the balance contract value.

10. Insofar as the claim of IDEB for compensation on account of increase in cost of materials was concerned, the same was accepted as the Arbitrator found PHHL to be mainly responsible for the delay in performance of the Agreement. It was held that the final architectural and structural drawings of the building plans including basement work were revised and IDEB did not receive suitable drawings for construction work nor the details of floor partition even by 12.03.2007, that is, after the timeline for the Agreement as originally scheduled had ended on 10.09.2006. The cross-examination of one of PHHL's witness also revealed that the floor drawings of third, sixth and eighth floors were modified or improved upon upto January 2009 and the false ceiling had to be re-laid. There were delays on PHHL's part in handing over all the work fronts as it took four to five months to release the drawings and all the deviations involved extra items. It was also held that the matter of approval of vendors for specialized works was also delayed on the part of PHHL. The Arbitrator further found PHHL to be responsible for certain other delays like delay in taking decision on the use of green marble, glazed type and structural glazing, stainless steel and rainwater harvesting and approval of granite samples, etc. In the light of the above, IDEB was awarded compensation on account of increase in cost of materials for all the works performed during the period between 10.09.2006 (the original completion date of the Agreement) and 07.10.2008 (when IDEB invoked the arbitration clause) on the basis of the formula given in Clause 40.1 of the General Conditions of Contract (GCC) along with interest at the rate of 12% p.a. from the date of the impugned award till realization. As the

compensation granted for increase in cost of materials was found sufficient to satisfy IDEB's claims relating to site overheads and head office overheads, loss of productivity from tools and plants and loss of profit, hence, the same were rejected.

11. With regard to the claim for interest on delayed payments made to IDEB, the same was rejected as it was held that although the Agreement provides for '*amount admissible*' being paid within 15 days of the submission of the bill but the Agreement is silent and does not provide for payment of interest at a specified rate if the payment is not released in 15 days. Further, it was held that the said claim does not take into consideration the fact that the bills submitted may not have been complete in all respects so as to be entitled to payment.

12. Further, PHHL was held liable for refund of interest at the rate of 6% p.a. out of the interest charged at the rate of 10% p.a. - as the rate was not found to be nominal - on the portion of the mobilization advance released to IDEB by PHHL, which was deducted from the running bills of IDEB. The said amount to be refunded was quantified as ₹5,09,325.84 to be paid along with interest at the rate of 12 % p.a. from the date of the impugned award till payment of such sum. However, the claim of IDEB towards interest paid on Borrowings, Margin Money of Bank Guarantees/ Performance Guarantees/ Security Deposits, etc. for the extended period of the Agreement did not succeed as the Arbitrator held that IDEB had to keep the aforesaid guarantees alive in order to execute the Agreement even in its normal course and there is no material on record to suggest the contrary.

13. The counter claims of PHHL were rejected as the Arbitrator held that PHHL contributed to the delay in performance of the Agreement and therefore, must bear the responsibility for such breach in performance of obligations.

14. The Arbitrator also went onto award ₹10,00,000/- as costs in the favour of IDEB.

Submissions

15. PHHL has challenged the impugned award mainly on the ground that compensation for increase in the cost of materials could not have been awarded for the extended period of the Agreement on the basis of clause 40.1 (amended) of the GCC as the said clause expressly bars escalation during the extended period. The said clause is reproduced as under :-

“40.0 Price Adjustment

40.1 If the prices of materials (not being materials supplied or services rendered at fixed prices by PHHL) and/or wages of labour required for execution of the work increase/decrease, the contractor shall be compensated for such increase/decrease as per provisions detailed below and the amount of the contract shall accordingly be varied, subject to the condition that that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract. No escalation shall be paid for the work executed in extended contract period even if extension of time is granted without any action under clause 42. Such compensation for escalation in the prices of materials and labour, when due, shall be worked out based on the following provisions.”

16. It is the case of PHHL that during the arbitral proceedings, IDEB referred to the unamended Clause 40.1 of the GCC; PHHL had objected to the same by relying upon the amended version of Clause 40.1 of the GCC, which bars escalation for the extended period; however, the Arbitrator without dealing with the said objection, granted escalation as compensation under the said clause.

17. It is also the grievance of PHHL that the claim of IDEB with regard to compensation for increase in the cost of materials should have been dismissed as it was held that "*the requisite material for working out such price adjustment is not available before the Tribunal, nor the figure has been worked out ...*". PHHL contends that since IDEB had failed to establish the claim for increased cost of materials, the claim ought to have been rejected.

18. PHHL further asserts that the impugned award is in conflict with the public policy of India as the same does not finally adjudicate the disputes between the parties as the Arbitrator has only awarded the entitlement to the claim for compensation on account of increase in the cost of materials and not the claim itself. In this regard, the operative para of the impugned award reads as under :-

“As the requisite material for working out such price adjustment is not available before the Tribunal, nor the figure has been worked out, it is directed that the Claimant shall within a period of 3 months from the date of pronouncement of this Award submit a bill to the Respondent claiming price adjustment on the cost on work done between 10.09.2006 and 07.10.2008. Such bill shall be cleared for payment within a period of 2 months from the date of submitting the bill subject to the bill being found in order.”

19. Further, PHHL submits that the claim for refund of interest paid on mobilization advance ought to have been rejected as the submission made by it regarding IDEB being not coerced to pay interest at the rate of 10 % p.a. was accepted by the Arbitrator. Moreover, IDEB had never protested against the levy of such interest until the filing of its Statement of Claim before the Arbitrator. In addition, PHHL claims that no relief for refund of interest paid beyond the nominal rate was prayed for by IDEB in its Statement of Claim and therefore, the Arbitrator could not have concluded that only nominal interest should be charged from IDEB in the absence of any such claim.

Reasoning and Conclusion

20. At the outset, it is necessary to observe that while considering a petition under Section 34 of the Act, a court does not sit in appeal over the arbitral award as an appellate court and therefore, cannot supplant its opinion in place of the decision of the arbitral tribunal. Unless it is established that the arbitral award is liable to be set aside on any of the grounds as indicated in Section 34 of the Act, no interference with the award would be warranted. Thus, the only question to be considered is whether the award of compensation on account of increase in the cost of materials (claim No.3) and whether refund of interest at the rate of 6% p.a. charged on mobilisation advance (claim No.6) is perverse and opposed to the public policy of India.

21. PHHL contends that the award of compensation for increase in the cost of materials is contrary to the express agreement between the parties and, therefore, opposed to the public policy of India. PHHL has also

asserted that refund of interest at the rate of 6% p.a. charged on mobilisation advance is also perverse as the claim made by IDEB that the same was paid under coercion was rejected.

22. The Arbitrator had examined the question whether PHHL was responsible for the delays in execution of the Agreement and had found that there were several delays on the part of PHHL, which had resulted in the delayed execution of the works under the Agreement. The Arbitrator had found that the possession of the site was handed over by PHHL to IDEB after a delay of about 21 days. He also found that there were delays on the part of PHHL to give approvals to IDEB in a timely manner and, further, there were significant delays in supply of plans, drawings, designs as well along with providing of requisite instructions for execution of the works. The aforesaid findings that there were delays on the part of PHHL are not amenable to judicial review in these proceedings. The said findings are substantiated by evidence on record and can by no stretch be contended to be perverse or without jurisdiction. The logical sequitur to the aforesaid findings would clearly be that IDEB would be entitled for damages.

23. The Arbitrator further accepted IDEB's contention that it was required to work beyond the period of two years, which could not have been foreseen by IDEB at the time of quoting for the rates of BoQ items. Accordingly, the Arbitrator held that IDEB would be "*entitled to compensation on account of increase in costs of materials, etc.*" The Arbitrator noted that IDEB had continued to execute the works beyond the original term of the Agreement during which the cost of materials especially cost of cement and iron had increased. Having concluded that IDEB was entitled to be compensated for increase in cost of materials, the

Arbitrator rejected the measure of damages as canvassed by IDEB – which was compensation as per the formula stated in *Hudson's Building and Engineering Contracts* - and found it reasonable to assess the same on the basis of the formula as provided in clause 40.1 of the GCC. It is clear from the plain reading of the impugned award that the Arbitrator had used the formula as provided in clause 40.1 of the GCC for assessing damages and not for computing the escalation in terms of the Agreement. The Arbitrator while discussing the award of damages had specifically noted that clause 40.1 of the GCC did not apply *stricto sensu*.

24. In ***Simplex Concrete Piles (India) Ltd. v. Union of India***: (2010) ILR 2 Delhi 699, a coordinate bench of this Court held that contractual clauses, which prohibit award of rightful damages would be void by virtue of Section 23 of the Indian Contract Act, 1872. The learned counsel for PHHL did not dispute the aforesaid proposition, however, he contended that clause 40.1 (as amended) “is not such a clause since it does not bar award of compensation per se under Section 73 of the Contract Act, 1872 but only prohibits grant of escalation in costs of materials, that too in the extended period of Contract.” He further submitted that the right of the contractor to claim general damages was not barred by clause 40.1 of the GCC but the same could not include escalation in the cost of materials. However, as noted above, the Arbitrator has not awarded escalation in the cost of materials in terms of clause 40.1 of the GCC but has merely borrowed the formula as provided thereunder for computing the measure of damages.

25. It was contended that damages could not be awarded as the Arbitrator had found that both the parties were responsible for delay in the performance of the Agreement. In paragraph 5.61 of the impugned award,

the Arbitrator observed that *“there has been delay at some point or the other on the part of both the sides”*; however, the impugned award must be read as a whole and this finding must also be read in conjunction with the rest of the impugned award. It is relevant to note that the Arbitrator had also concluded that there were certain delays on the part of IDEB, but IDEB was not responsible for the said delays as they were caused for reasons beyond its control. He had also observed that despite various factors, IDEB had continued to execute the works. Further, while considering the counter claims, the Arbitrator had specifically concluded that PHHL *“has also been instrumental in contributing to the delay in performance of the works under the contract”* and *“should mainly bear the responsibility for such beach in performance of obligations”*. Thus, on a plain reading of the impugned award as a whole, it is clear that the Arbitrator had found PHHL to be principally responsible for the delays and therefore had awarded damages to IDEB limited to the increase in the cost of materials while rejecting IDEB’s claims on other counts.

26. In view of the above, the impugned award insofar as it awards compensation for increase in cost of materials in favour of IDEB, no interference by this Court is warranted as the said conclusion cannot be held to be opposed to the public policy of India.

27. This Court also finds no infirmity with the Arbitrator setting down the basis for calculation of compensation and directing that the same be computed by IDEB and verified by PHHL. It was not necessary for the Arbitrator to compute the figures and state the same in the impugned award.

28. The next controversy to be examined is PHHL’s challenge to the award of return of interest at the rate of 6% p.a charged on mobilisation

advance. PHHL had provided mobilization advance to IDEB and charged interest at the rate of 10% p.a. The Arbitrator found that the said interest was not *nominal* as was offered by IDEB and accordingly directed interest at the rate of 6% p.a. be refunded to IDEB.

29. In terms of clause 8 of the Special Conditions of Contract (SCC), the contractor was entitled to interest free mobilization advance, if the same was specifically requested in the offer itself. Admittedly, interest free mobilization advance was not a part of the offer tendered by IDEB and therefore IDEB would not be entitled to the same. The Arbitrator had also noted the same. Thereafter, on 14.08.2004, IDEB sent a letter claiming that it had agreed to a discount on the contract price taking into consideration that mobilization advance would be provided to it. The Arbitrator had noted that there was no documentary evidence to support the averments made by IDEB in its letter of 14.08.2004. IDEB had further requested that mobilization advance be released against a bank guarantee and that it was willing to pay nominal interest on the same. PHHL responded by sending a letter dated 22.09.2004 wherein it agreed to provide mobilization advance however, on simple interest at the rate of 10% p.a. The said letter is set out below:-

“Dear Sir,

We refer to your letter no. ND/IDEB/04-05/413 dt. 14/08/04 on the above subject and would like to inform you that the Competent Authority of Pawan Hans Helicopters Ltd have considered your request for Mobilization Advance as per clause no. 8.00 of Special Conditions of Contract against Bank Guarantee (as per format given in the tender) issued by a nationalized scheduled bank. However, simple interest @ 10% per annum shall be charged on Mobilization Advance as agreed by you.

You may put up your request for Mobilization Advance in form of 1st Running Account Bill in the format duly approved by APMC/PHHL alongwith Bank Guarantee for total Mobilization Advance.”

30. Admittedly, in terms of the letter dated 22.09.2004, IDEB had put up the request for mobilization advance in the form of a Running Account Bill along with the bank guarantee. IDEB therefore cannot dispute that it had not accepted the terms of mobilization advance as set out in the letter dated 22.09.2004. Interest at the rate of 10% p.a. was charged by PHHL and deducted from the running bills submitted by IDEB. The learned counsel for IDEB also did not counter the submission that there was no protest by IDEB with respect to such deductions.

31. IDEB had claimed that it was coerced into accepting the condition of payment of interest. However, the Arbitrator had repelled the said contention. The Arbitrator had accepted that IDEB's pleadings did not provide any particulars as to the alleged coercion nor was there any evidence that coercion was practiced on IDEB. Nonetheless, the Arbitrator proceeded on the basis that IDEB had agreed to pay nominal interest, which was assessed by the Arbitrator as 4% p.a. Accordingly, the Arbitrator directed refund of interest paid at the rate of 6% p.a.

32. The aforesaid finding cannot be sustained considering that IDEB's claim that it was coerced to pay interest on mobilization advance was not accepted by the Arbitrator; having rejected the same, there was no occasion for the Arbitrator to reduce the rate of interest charged from 10% p.a. to 4% p.a. PHHL had agreed to release mobilization advance on interest at the rate of 10% p.a. by its letter dated 22.09.2004. Clearly, the same was accepted by IDEB as IDEB complied with the condition of submitting their

Running Account Bill for claiming such mobilization advance and furnishing the bank guarantee as indicated in the said letter. In the circumstances, this Court finds it difficult to accept that the Arbitrator had any jurisdiction to reduce the rate of interest from 10% p.a. to 4% p.a.

33. It is relevant to note that the learned counsel for IDEB had contended that its offer to pay nominal interest by its letter dated 14.08.2004 was not accepted by PHHL and therefore the said offer had lapsed. He had sought to sustain IDEB's claim for refund of interest on the basis that the Agreement was entered into after 14.08.2004 - that is, on 01.09.2004 - and the Agreement provided that grant of mobilization advance would be interest free. It is, thus, seen that even the learned counsel for IDEB did not support the rationale provided by the Arbitrator, which was based on IDEB's letter dated 14.08.2004 whereby IDEB had offered to pay '*nominal interest*'. The contention that interest free mobilization advance was to be provided to IDEB in terms of the Agreement executed on 01.09.2004 is not sustainable since in terms of clause 8 of SCC, interest free mobilization advance could be made available only if it was a part of the offer tendered by the bidder and this was not so in the present case. The Arbitrator had held the same that IDEB's offer did not include interest free mobilization advance. Accordingly, award of refund of interest at the rate of 6% p.a. on mobilization advance (claim No.6) cannot be sustained and the impugned award to the said extent is liable to be set aside.

34. Insofar as PHHL's challenge to the award of costs is concerned, the Arbitrator had awarded the sum on the basis that "*the Claimant has succeeded in part in his claims while the counter claims have been rejected*". I find no infirmity with the said reasoning. IDEB had succeeded

in part of its claims whereas counter claims raised by PHHL were rejected. It is also well settled that the award of costs is within the discretion of the arbitrator. This Court finds no infirmity on the exercise of such discretion and accordingly PHHL's challenge to the same is rejected.

35. In view of the above, the impugned award is set aside to the limited extent that it includes an award of refund of interest at the rate of 6% p.a. on mobilization advance. The petition is disposed of.

36. No order as to costs.

JANUARY 09, 2017
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VIBHU BAKHRU, J

