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

\+ FAO(OS) (COMM) 178/2017, C.M. APPL.34718-34721/2017

UNION OF INDIA ..... Appellant

Through : Sh. Praveen Kumar Jain, Advocate and Sh. Parag Yadav, AR.

versus

AHLUWALIA CONTRACTS (INDIA) LTD ..... Respondent

Through : Sh. S.K. Manaktala, Sh. Vinod Kumar and Sh. Sanjay Kumar, Advocates, for respondent.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SUNIL GAUR

O R D E R

% 22.09.2017

C.M. Appl.34720-21/2017

1. For the reasons mentioned in the application, the delay in filing and refiling is condoned. C.M. Appl.34720/2017 and 34721/2017 are accordingly disposed of.

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2. The appeal is directed against the appellant/Central Government through the Ministry of Health and Family Welfare and challenges the judgment and order of the learned Single Judge, partly allowing the petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereafter referred to as “the 1996 Act”], made by the respondent/claimant [hereafter to as “Ahluwalia Contracts”].

3. Ahluwalia Contracts, the claimant had urged disputes which were referred to arbitration by a tribunal. The dispute related to works under an

agreement, i.e. contract for *Package III, Electrical Services at AIIMS, Raipur* dated 11.08.2011. The contract value was Rs.41,20,09,326/-.

4. Ahluwalia Contracts complain that the Central Government failed to hand-over the entire site even till December 2015 and it urged that the duration of the agreement originally set for 16 months, was extended not less than eleven times. On account of delay, several claims were made. A total of 17 claims, inclusive of interest and costs were made. The tribunal allowed claim nos. 1, 2, 6, 8, 9, 10, 11, 15 and 16 but rejected others.

5. Learned Single Judge, after considering the pleadings and the submissions of the parties and also analysing the stipulations in the contract set-aside the rejection of claim nos. 3, 4, 5 and 7. The reasoning adopted by the Tribunal for rejecting these claims was that the formula agreed, and provided for under clause 40(h) of the Special Conditions of Contract (SCC) precluded the amounts. The Ahluwalia Contracts' claim with respect to the rejection of other claims by the arbitrator, however, were upheld.

6. Before this Court, it is argued on behalf of the appellant that the learned Single Judge had adopted an illogical approach. It is pointed-out that the learned Single Judge correctly interpreted the law and upheld the rejection of claim no.14 relating to expenses incurred on tours and travels by Ahluwalia Contracts officials to carry-out Factory Acceptance Tests. It was submitted that the interpretation given to clause 16(a) and clause 16(c) ought to have been adopted in the interpretation to clause 40(h) of the SCC. It is submitted that the tribunal rejected claim nos. 3, 4, 5 and 7 for valid reasons and gave effect to clause 40(h). In reappreciating that reasoning, the learned Single Judge went beyond the scope and mandate of Section 30 of the 1996 Act. Learned counsel relied upon the judgment of the Supreme Court in

Associate Builders v. DDA 2014 (3) SCC 49.

7. It is submitted that the learned Single Judge lost sight of the fact that the tribunal was a lay individual unversed in law and, therefore, could not be expected to explain the reasoning in a logical and coherent manner as is expected of law. This lacunae could not he held against the basic soundness of the reasoning which should have been approved given the limited and circumscribed jurisdiction under Section 34. It was submitted that clause 40(h) was an agreed term which specifically precluded compensation for any delay caused in respect of any of the features set-out in that contractual term. In proceeding to upset the award to the extent of disallowance of claims that were in fact so covered by the preclusion, learned Single Judge fell into error.

8. The claim supported the reasoning of the learned Single Judge and submitted that clause 40(h) has to be construed in a reasonable manner. It was pointed-out that the award of the Tribunal in various places, especially relating to claim nos. 6,8, 9, 10 and 11 have specifically recorded that there were delays on the part of the employer, i.e. the Central Government. It was submitted that having regard to these, the learned Single Judge merely interpreted clause 40(h) in a reasonable manner and set-aside the reasoning of the tribunal denying the specific heads of claims. Clause 40(h) of the contract which is in dispute in the present case reads as follows:

> *"<u>Delay in starting the work</u>"*
> *No compensation shall be allowed for any delay caused in the starting of work on account of acquisition of land, encroachment or in case of clearance of works, on account of any delay in according sanction to estimates in issue of drawings, decisions etc. However, the extension of time shall be granted as per relevant conditions of contract."*

The record discloses that in several places, the tribunal recorded that there were extensions. In claim no.1, the fact that the claimant had to shift equipments from time to time on account of which it incurred expenditure was found; that is not disputed. The amounts were awarded towards that score. Likewise, claim no.2 also was awarded in respect of claim nos.3,4, 5 and 7, however, the tribunal adopted a textual interpretation of clause 40(h). The tribunal recorded in respect of claim no.8 as follows:

> *"No doubt, the Claimant is obliged to keep the PBG alive during the duration of the contract (which also extends to the prolonged period). But admittedly, the prolongation of contract was attributable to the Respondent."*

9. Likewise, in respect of claim no.9, the following finding was recorded:

> *"It is an admitted fact that the prolongation was caused due to the default of the Respondent. In such situation, if the additional expenditure incurred by the Claimant, which was not envisaged originally, if not accepted, would tantamount to miscarriage of justice.*
>
> *I am, hence inclined to accept the Claimant's submission that since the prolongation was attributable to the Respondent, the additional expenditure incurred should be borne by the Respondent.*
>
> ***Hence, Claim for Rs, 4,18,325/- is accepted."***

10. Similarly, in respect of claim no.10, the finding is as follows:

> *A close examination of the above provision makes it abundantly clear that the cost of providing a vehicle with driver and fuel was for stipulated period i.e. 16 months. Very long prolongation, could not have been anticipated by the Claimant so as to include any additional expenditure in the quoted cost.*

This is an additional cost directly attributable to the Respondent. It is an admitted fact, that the prolongation of contract happened because all the sites were not handed over to the Claimant as per the project milestones. The Claimant continued to provide the vehicle with driver as per the contractual obligation, though it stands to reason that during this period virtually no work got executed. This additional expenditure could have been avoided had the Respondent indicated not to avail this service during the prolongation of contract. Since, this services has been availed by the Respondent, in fitness of things, he should bear the additional expenditure incurred .

Hence, Claim Rs. 6,63,289/-is accepted.

11. So far as claim no.12, i.e. loss of profit is concerned, the relevant finding is as follows:

"The Respondent has argued that since extension of time has been granted as per relevant conditions, hence Respondent cannot be accused of breaches of contract provisions. It is an admitted fact that time was of essence of the contract and the Respondent invited offer from such contractors who had the ability to complete the work within the contract period (18 months which was reduced to 16 months when the contract was finally signed). It is reasonable to accept that the Claimant while submitting his offer, calculated his cost to be incurred durmg this period and must have provided for reasonable percentage of profit out of the work getting completed within the contract period.

It is also admitted that due to non availability of site (which was to be provided by the Respondent) the Claimant could not complete his work within the stipulated period. In the present arbitration proceeding, the Claimant has made various claims on account of prolongation of the contract. Such claims also include 'Contractor's overhead and profit' as per contractual provisions."

12. It is apparent from the above extracts of the award that the tribunal repeatedly held against the employer with respect to the issue of delay. Having regard to these circumstances, the learned Single Judge considered the impact of such delay on the claims that were turned-down by the tribunal i.e. claim nos. 3,4, 5 and 7. These claims are in respect of *Running Cost of the Site Office (for the prolonged/extended period and upto 30.06.2014; Expense on account of pay and allowances of the Staff (for the prolonged/extended period and upto 30.06.2014); Expense incurred on telephone, staff welfare, conveyance, tour & travel, and vehicle to site staff (for the prolonged/extended period and upto 30.06.2014) and Expense on labor welfare during extended period (for the prolonged/extended period and upto 30.06.2014.*

13. If one considers the extended period in question, which is 60 months, the unreasonableness of the textual approach is writ large on the face of the record. What can be considered reasonable had to be seen within the context of the time-frame agreed to by the parties. Thus, for example, if the delay had been about 3-4 months, it would have roughly translated to 20-25% of the overall time-frame agreed to by the parties; the denial of any amount similar to the ones claimed by Ahluwalia Contracts would have been justified. However, the delay in this case went far beyond that and in fact amounted to more than three times the time agreed by the parties. It was keeping in mind these circumstances which were apparent from the record that the learned Single Judge held the arbitrator's approach to be unreasonable and set-aside the findings, disallowing claim nos.3, 4, 5 and 7.

14. One of the vitiating factors that strikes at the root of the award in accordance with the established authority, including *Associate Builders*

(supra) is if the award discloses an approach or renders findings which no reasonable man or individual would have arrived at in the given circumstances of the case. The present is one such. The denial of claim no.14, if seen in the context of these circumstances, as juxtaposed with denial of claim nos. 3, 4, 5 and 7, is radically different. The denial of claim no.14 in such circumstances cannot be called unreasonable whereas denial of claim nos. 3, 4, 5 and 7 can be called unreasonable.

15. For the above reasons, that the impugned judgment does not disclose any error or unreasonable approach,

16. It was stated during the hearing that in compliance and in furtherance of the impugned judgment, the claimant has approached the appellant for a fresh reference in respect of claims that were rejected but restored by the learned Single Judge. If so, the Central Government is directed to take a decision and make appropriate reference for adjudication of the claims afresh in accordance with law. The appeal is accordingly dismissed but with the above observations.

S. RAVINDRA BHAT, J

SUNIL GAUR, J

SEPTEMBER 22, 2017/AJK