IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.493 OF 2013

Union of India … Petitioner
Versus
Hindustan Construction Co. Ltd. … Respondent

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Ms. Jyotsna Pandhi for the Petitioner.
Mr. Darius Khambata, Senior Advocate a/w Ms. Naira Jeejeebhoy and Ms. Diksha Shetty I/b M/s Harish Joshi & Co. for the Respondent.

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CORAM : S.C.GUPTE, J.

DATE : 4 DECEMBER 2018

P. C. :

. Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed an arbitral tribunal consisting of three arbitrators. The reference arose out of disputes and differences between the parties, concerning a contract for reconstruction of dry dock and associated north and south wharves at Naval Dockyard, Mumbai. The contract was awarded to the Respondent herein by Director General, Naval Project, Mumbai on behalf of the Union of India vide Contract DGNP (MB)/01 of 2009-10. The award of the contract was in pursuance of a notice inviting bids and acceptance of the Respondent's tender submitted in response thereto. The contract was a lump sum contract; its value was of Rs.3,08,39,12,805.00. The disputes between the parties concern the Respondent's claim for Octroi Exemption Certification for material used in the project. The contract between the

parties required the claimant to go in for pre-arbitral decision of Deputy Director General & Chief Engineer of DGNP (MB), for short referred to as “DDG & CE”. The Respondent herein accordingly resorted to a reference to DEG & CE. The DDG & CE was expected to give notice of his decision to the Employer and Contractor within 30 days of having received the notification of the reference. If either the employer or the contractor was dissatisfied with the decision of DDG & CE, or if the DDG & CE failed to give notice of his decision on or before the thirtieth (30^{th}) day after having received notification by either party, then either the Employer or Contractor, on or before the 30^{th} day after the expiry of 30^{th} day, referred to above, was entitled to give notice to the other party of its intention to commence arbitration. The arbitration could be commenced only after such notice. There is no dispute that pre-arbitral decision by DDG & CE was given in favour of the Respondent; DDG & CE held that the contractor was entitled to issue of octroi exemption certificate/s by the employer as requested but only for quantities certified by the consultant to be incorporated in permanent works of dry dock and wharves. Dissatisfied with the decision of DDG & CE, the employer gave the requisite notice and invoked the arbitration agreement. That is how the matter went before the arbitral tribunal. The tribunal in its impugned award held that the Respondent was entitled to receive octroi exemption certificate from the claimant-employer for everything imported into the city of Mumbai and which eventually would be incorporated in dry dock and wharves as part of permanent works. The arbitral tribunal held that the Respondent was entitled to receive such certificate/s on a request basis as and when necessary during the course of execution of the project. The tribunal held that, on this premise, the Respondent was entitled to receive reimbursement of expenditure incurred by it towards payment of octroi on the dates when it became due to it, on account of failure of the claimant to issue octroi exemption certificate/s at the material time. The tribunal held that the Respondent was entitled to receive interest on unpaid sums with effect from 30 days after the arbitration award was published and till the date of actual payment at the rate specified in the contract. All other claims and requests were rejected. This award has been impugned in the present arbitration petition by the claimant-employer.

3 The arbitral tribunal, in the first place, after scrutinizing the relevant clauses and sub-clauses of the agreement between the parties, including Clause No.24, which was added by way of amendments/errata, and correspondence between the parties, held that on a conjoint reading of these clauses, sub-clauses and extracts of letters exchanged between the parties before the acceptance of the bid forming part of the contract agreement, it agreed with the Respondent that the relevant clauses required the employer to commit itself to issue octroi exemption certificate/s on demand, if the other conditions stipulated in clause 24 were satisfied. The tribunal held that if there was any ambiguity, the same would have to be interpreted against the drafter on the basis of the rule of *contra proferentem*. That certainly is a pre-eminently possible, and, infact preferable, reading of the contract. Coming now to the aspect of satisfaction of the other conditions stipulated in clause 24, it is pertinent to note that Clause 24 required issuance of octroi certificate on a request from the contractor "*for the complete equipment and items which will be incorporated in Dry Dock and Wharf as part of permanent works*". The employer's case was that only specific complete equipments and items to be

incorporated permanently in the project, were entitled to octroi exemption certificate, and these did not include any item brought in and to be used for the civil work. This particular interpretation of the contract suggested by the employer was rejected by the arbitral tribunal. The tribunal held that plain meaning of the words in clause 24 indicated that the only pre-condition for issue of octroi exemption certificate was that whatever equipment or item, for which such certificate was asked for, should necessarily form part of the permanent work in the dry dock or wharf. The tribunal held that cement, sand, aggregate, etc. which go into the permanent work qualified for the issue of octroi exemption certificate, subject of course to their quantity being certified by the consulting engineer. This again is a pre-eminently possible view of the contract between the parties. The arbitrators considered the fact that the prospective bidders had raised a query and sought clarification from the employer about addition or otherwise of octroi levies in their bids. The clarification issued by the employer referred to octroi exemption certificate for 'specific complete equipments and items to be incorporated permanently in the project'. The arbitrators noted that nowhere had it been elaborated as to which specific complete equipments and items to be incorporated permanently in the project would qualify for issue of octroi exemption certificate. In the light of rival cases of the parties and documents on record, the arbitral tribunal was of the view that word "specific" in this context did not, in the circumstances, hold any particular relevance. The tribunal was of the view that if there was to be any special significance to the word "specific" in this context, it was for the employer to make it clear in the document itself and since that was not done, there was no special significance to be attached to the term. This again is a perfectly possible and legitimate view. The arbitrators not only considered the clarification issued by the employer in this behalf, but in fact went by the express terms of the specific clause, namely, clause 24, which did not use the word "specific" in the body of the rule as part of the amendments/errata.

4 Learned Counsel for the Petitioners submits that this being a lump sum contract and it being difficult to maintain accounts of consumable materials, and calculate quantities of consumable materials that go into the permanent works of dry dock and wharves, octroi exemption certificates could not be issued for these materials. This aspect was duly considered by the arbitral tribunal. The arbitral tribunal held that if such was the intent, the contract document would have been carefully worded to reflect that intent. The tribunal held that calculation of quantities of consumable materials that went into the permanent works of dry dock and wharves could always be worked out on the basis of design mix, etc. Once again, this exhibits a clearly possible view.

5 It is also one of the submissions of the Petitioners that there was no practice of Government departments and offices of Navy in and around Mumbai, Pune, etc to issue octroi exemption certificates for civil works. The arbitrators have taken into account the practice of allowing such certificates prevalent in Bhaba Atomic Research Station, which is a Government organization. Besides, the arbitrators held that they were not concerned with what practice prevailed or otherwise; their task was to analyze the dispute before them based on the contract agreement signed by the parties for the particular project.

6 It is lastly submitted by learned Counsel for the Petitioner that the arbitrators could not have awarded this particular claim of the Respondent, since there was no specific counter claim formulated in its statement of defence. There is no merit even in this submission. The Respondent, after all, went first to the pre-adjudication board expressly claiming that it was entitled to receive octroi exemption certificate/s. The adjudicator held in its favour, observing that the Respondent was indeed entitled to receive octroi exemption certificates. It was the Petitioner-employer, who went in challenge before the arbitral tribunal. It the tribunal were not to concur with the Petitioner in its challenge, it had no option but to hold that the Respondent was indeed entitled to receive octroi exemption certificate. The award, in other words, upholds whatever was held by the adjudication board. No infirmity can be found vis-a-vis the approach of the arbitral forum in this behalf. Besides, the Respondent had infact included appropriate prayers to this effect, that is to say, to secure their entitlement to receive octroi exemption certificates as part of their statement of defence. The prayers are to be found in the statement of defence as clauses 1 to 4.

7 In the premises, there is no merit in the challenge to the impugned award. The Arbitration Petition is, accordingly, dismissed. The Respondent shall be entitled to the costs of this petition, which are quantified at Rs.1,00,000/-.

(S.C. GUPTE, J.)