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

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Pronounced on: 25.04.2018

+ O.M.P. (COMM) 265/2016

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Petitioner

Through Mr.Ravi Sikri, Senior Advocate with
Mr.Mukesh Kumar and Mr.Deepak
Yadav, Advocates.

versus

M/S INTERCONTINENTAL CONSULTANT AND
TECHNOCRATS PVT LTD

..... Respondent

Through Mr.Anish Dayal and Mr.Siddharth
Vaid, Advocates.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed by the petitioner under Section 34 of the Arbitration and Conciliation Act seeking to set aside the Award dated 10.6.2015 passed by the learned Sole Arbitrator.
2. The petitioner is a Statutory Body constituted under Section 3 of the NHAI Act, 1988. The petitioner entered into a Consultancy Services Agreement dated 28.1.2002 (hereinafter referred to as the 'Agreement') with the respondent regarding services for construction and supervision of 4-Laning and Strengthening of the Existing 2-Lane Section from Km 199.660 to Km 250.500 and from Km 250.500 to Km 307.500 on NH-2 in Uttar Pradesh under Fourth Loan Package of World Bank Project.
3. The contract price for the project was Rs.115,625,260/-. This was exclusive of local taxes which were estimated to be Rs.37,00,600/-. The work commenced from 31.3.2002 and was to be completed in 51 months i.e.

on 30.06.2006. Some dispute arose between the parties pertaining to reimbursement of income tax paid to Government of India on behalf of the expatriate staff (Foreign Personnel Domiciled outside India) for consultancy services. The respondent/claimant claimed an amount of Rs.66,37,332/- on account of the same. Claims No.2 and 3 were consequential claims of interest whereas claim No.4 was for payment of arbitration cost.

4. The controversy centred around the interpretation of clause 1.10.1 and 1.10.2 of the Special Conditions of Contract. It was the contention of the respondent/claimant that clause 1.10.2 of the Agreement covers the tax liability of the Foreign Personnel domiciled outside India (Expatriate Staff).

5. It may be noted that the claim of the respondent centres around two foreign personnel Mr.J.R.Gaitlamaintan and Mr. B.K. Akoto who were hired/employed by the respondent under the head of 'Remuneration of Expatriate Staff'. The respondent had submitted supplementary invoices for reimbursement of the tax liability of the two foreign personnel paid by the respondent on behalf of the personnel for the relevant financial years from time to time from the period 2002 to 2010 along with relevant vouchers.

6. The learned Arbitrator by his Award accepted the claims of the respondent for Rs.67,33,332/- (should read Rs.66,37,332/-) under claim No.1. A sum of Rs.25,52,799/- was awarded on account of interest from the due dates till the date of Arbitral Reference i.e., 3.4.2012. Claim No.3 being interest from 4.4.2012 till the date of Award and future interest was also awarded @ 10% per annum. Claim No.4 regarding the cost was declined and the parties were left to bear their own costs.

7. Relevant clauses of the Agreement being 1.10.1 and 1.10.2 reads as follows:

“1.10.1 For domestic Consultants and foreign consultants who are permanent residents in India

‘The Consultants, Sub-consultants and the Personnel shall pay the taxes, duties, fees, levies and other impositions levied under the existing, amended or enacted laws during life of this contract and the client shall perform such duties in regard to the deduction of such tax as may be lawfully imposed.

1.10.2 For foreign Consultants_

The client warrants that the Client shall pay on behalf of the Consultants, Sub-Consultants any taxes, duties, fees, levies and other impositions Imposed in India, under the Applicable Law, on the Consultants and Sub-Consultants in respect of:

- (a) any payments whatsoever made directly by the client to the Consultants and sub-consultants (as authorized by the Consultant), in connection with the carrying out of the Services;
- (b) any equipment, materials, and supplies brought into India by the Consultants or Sub-consultants for the purpose of carrying out the Services and which, after having been brought into such territories, will be subsequently withdrawn therefrom by them;
- (c) any equipment imported for the purpose of carrying out the Services and paid for out of funds provided by the Client and which is treated as property, of the Client;
- (d) any property brought into India by the Consultants, any Sub-consultants, the Personnel of either of them (other than Indian nationals or permanent residents of India), or the eligible dependents of such Personnel for their personnel use and which will subsequently be withdrawn therefrom by them upon their respective departure from India, provided that:
 - (1) the Consultants, Sub-consultants and Personnel, or eligible dependents, shall follow the usual customs procedures of the Government In importing property Into India; and
 - (2) if the Consultants, Sub-consultants or Personnel, or their eligible dependents, do not withdraw but dispose of any

property in India upon which customs duties and taxes have been exempted, the Consultants, Sub-consultants or Personnel, as the case may be,

- (i) shall bear such customs duties and taxes in conformity with the regulations of the Government, or
- (ii) shall reimburse them to the Client if they were paid by the Client at the time the property in question was brought into India..”

8. The learned Arbitrator accepted the claim of the respondent and noted as follows:-

(i) The present project is pursuant to a World Bank loan. As per the evidence on record, the tax liability of Foreign Personnel (Expatriate Staff) is of the petitioner, as per World Bank Policy and as per Trade Practices followed uniformly. For several contracts regarding World Bank Project the admitted fact is that the petitioner has borne the tax liability of the Foreign Personnel engaged by the various consultants even though the relevant clauses were not exactly identical.

(ii) It is admitted by the petitioners that under clause 1.10.2, the petitioner is liable to pay the tax liability for Foreign Personnel of Foreign Consultant. Hence, what has been pleaded is that where the bidder is a Foreign Consultant and engages a Foreign Personnel who is not based in India, tax liability of such a personnel would be borne by the petitioner. But where Indian Consultants were to engage a Foreign Personnel not based in India, tax liability would be of the domestic consultant. Clearly, this was discriminatory inasmuch as it was not permissible for the petitioner to discriminate between foreign bidders and domestic bidders. This is especially so as the tender was a global tender.

(iii) The learned Arbitrator also relied upon Appendix H of the Cost Estimates which related to summary of cost in local currency and did not provide any liability for tax payment whereas Appendix G which related to summary of cost in foreign currency had left the column 'taxes and duties' blank and also noted the tax and duties are payable by the petitioner as per applicable law and as per clause 1.10 of Special Conditions. This was stated to mean that for expatriate staff, it would be the liability of the petitioner to pay taxes. The column was not filled as the tax could be variable.

9. I have heard learned counsel for the parties.

10. Learned senior counsel for the petitioner has vehemently argued as follows:-

(i) He has strongly submitted that the learned Arbitrator has not interpreted the terms of the contract but has added words to the arbitration agreement. He submits that this was a totally illegal interpretation and hence, the Award is liable to be set aside.

(ii) It has also been strenuously urged that for domestic consultants, there was no liability on the part of the petitioner to pay for the income tax. It was wholly the liability of the consultants. Clause 1.10.2 was applicable only to foreign consultants. It did not apply to foreign personnel engaged by domestic consultants and any interpretation to the contrary was contrary to the terms of the contract and amounts to adding words to the contract.

11. Learned counsel for the respondent has reiterated that reimbursement of foreign personnel is a concept well known in World Bank Contracts and ADB Contracts. It is pleaded that the present contract was a World Bank Contract and the same norms have to be followed. It could not have been intended that the tax liability of foreign personnel based abroad would not be

borne by the petitioner, merely because the respondent was a domestic consultant.

It is further pleaded that it was a global competitive tender and it could not have been the intention of the petitioner to discriminate between foreign bidders and Indian bidders to argue that the Indian consultant, namely, an Indian bidder would have to pay for tax dues of expatriate employee whereas a foreign bidder would not have to pay. This would be grossly discriminatory.

Reliance was placed on Appendix G and H of the contract to support the contention that the learned Arbitrator has rightly interpreted the terms of the contract.

12. A perusal of Clause 1.10.2 of GCC clearly shows that under the said clause, the petitioner had agreed to pay on behalf of its consultants/sub-consultant any taxes, duties, etc. imposed in India on the consultant or sub-consultant in respect of any payment made directly by the petitioner to the consultants/sub-consultants in connection with carrying out the services. Merely, because the word 'personnel' is not used in the said clause, in my opinion would not make any material difference. The petitioner admits that foreign personnel engaged by foreign consultants would under Clause 1.10.2 of the GCC be eligible for reimbursement of the tax paid to the Government on account of the remuneration received by such foreign personnel. To interpret this clause, to mean that the same contention would also be applicable to foreign personnel based abroad who are engaged by Indian consultants appears to be a plausible and a possible interpretation of Clause 1.10.2.

13. I have already noted above, the grounds on which the learned Arbitrator has taken the above noted view. He has on facts concluded that the project in question is a world bank project and the world bank norm is to reimburse the consultants for taxes that have been reimbursed to foreign personnel. There were no cogent reasons given by the petitioner as to why the same system is not to be followed for the present agreement.

14. The learned Arbitrator has also noted the plea of the petitioner that clause 1.10.2 of the agreement applies only to foreign consultants and the foreign personnel whom they engage and does not apply to foreign personnel engaged by Indian consultants. It was noted that the tender was a global tender and it could not have been intended by the parties to discriminate between Indian bidders and foreign bidders. If the interpretation sought to be proposed by the petitioner was accepted, it would mean that an Indian bidder, namely, an Indian Consultant would have to pay for the tax liability for the foreign personnel whereas a foreign consultant would not have any such liability. Clearly, no such intent could be possible.

15. The third ground given by the learned Arbitrator was the difference in the wording of Appendix G and H of the agreement. Annexure H deals with summary of costs in local currency. The said appendix describes the cost net of tax. Appendix G deals with costs in foreign currency and includes remuneration for Expatriate Staff. The said appendix leaves the column of 'taxes and duties' blank in view of the fact that they may vary in future. The columns state that the duties and taxes will be payable by the petitioner as per applicable law and as per clause 1.10 of the Special Conditions of the agreement. Implicit in this was that it was the liability of the petitioner to pay for the tax liability of foreign consultants/personnel.

16. It is quite clear that the interpretation of clauses 1.10.1 and 1.10.2 of the Special Conditions as done by the learned Arbitrator is a plausible interpretation and cannot be faulted with. Interpretation of a contract is within the domain of the learned arbitrator. The Supreme Court in ***McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors., (2006) 11 SCC 181*** noted as follows:-

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission* (2003) 8 SCC 593] and *D.D. Sharma v. Union of India* (2004) 5 SCC 325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

17. The Supreme Court in ***Associate Builders. vs. DDA., (2015) 3 SCC 49*** held as follows:-

“44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan* [(2011) 10 SCC 573 : (2012) 3 SCC (Civ) 818] , the Court held: (SCC pp. 581-82, para 17)

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das v. Lachhmi Ram* [AIR 1954 SC 689] , *Thawardas Pherumal v. Union of India* [AIR 1955 SC 468] , *Union of India v. Kishorilal Gupta & Bros.* [AIR 1959 SC 1362] , *Alopi Parshad & Sons Ltd. v. Union of India* [AIR 1960 SC 588] , *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji* [AIR 1965 SC 214] and *Renusagar Power Co. Ltd. v. General Electric Co.* [(1984) 4 SCC 679 : AIR 1985 SC 1156])”

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* [(2012) 5 SCC 306] , the Court held: (SCC pp. 320-21, paras 43-45)

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother*

Steel Tubes Ltd. [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (*Sumitomo case* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

‘43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.’”

18. There is clearly no merit in the petition. The same is dismissed.

(JAYANT NATH)
JUDGE

APRIL 25, 2018

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