

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

Date of decision: 16.07.2018

+ **O.M.P. (COMM.) No.295/2018 & I.A. No. 9127-28/2018**

AKHIT CONSTRUCTION PRIVATE LIMITED Petitioner
Through: Mr. Pawan Upadhyay, Mr. Rajesh Chhetri, Ms. Meenakshi Rawat and Mr. Rajeev Chhetri, Advs.

versus

HIMALAYA CONSTRUCTION COMPANY PVT.LTD.Respondent
Through: Mr. Vikram Mehta and Mr. Subhadeep, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act"), seeking to challenge the award dated 18.04.2018, passed by the learned Arbitrator.

2. By virtue of the impugned award, the learned Arbitrator has awarded a sum of Rs.4,34,816/- in favour of the petitioner and a sum of Rs.73,95,780/- in favour of the respondent. Thus, in effect, via the impugned award, a direction has been issued to the petitioner to pay a net amount of Rs.69,60,964/- (i.e. Rs.73,95,780 – Rs.4,34,816) to the respondent along with interest calculated at the rate of 12% w.e.f. 01.04.2014 till the date of realization. Furthermore, a direction has also been issued in favour of the respondent for recovery of arbitral fee and

costs. The learned Arbitrator has quantified the counsel's fee at Rs.50,000/-. 3. The record shows that the petitioner had preferred three claims.

3.1 Via claim no.1, the petitioner sought recovery of a sum of Rs.66,24,666/-. Thus, claim no.1 had the following sub-heads: -

- (i) Money withheld by the principal employer i.e., Birahi Ganga Hydro Power Ltd. (in short "BGHPL"), amounting to Rs.50,89,280/-;
- (ii) Balance amount payable against the final bill amounting to Rs.10,26,545/-;
- (iii) Royalty paid on behalf of the respondent - Rs.88,314/-; and
- (iv) Lastly, cost of materials and other dues amounting to Rs.4,25,527/-.

3.2 Against claim no.2, the petitioner sought a sum of Rs.1,20,00,000/-. This amount was claimed by the petitioner on account of loss of profit as its contract with BGHPL, the principal employer, was foreclosed. According to the petitioner, foreclosure of the contract occurred due to the fault of the respondent.

3.3 The third and final claim made by the petitioner (i.e. claim no.3) pertained to demand for interest at the rate of 18% per annum.

4. As indicated above, via the impugned award the learned Arbitrator, against the claims made, awarded only a sum of Rs.4,34,816/-.

4.1 To be noted, qua claim no.1, the Arbitrator rejected the first limb of that claim, whereby, a sum of Rs.50,89,280/- was demanded by the petitioner from the respondent towards the amount retained by BGHPL. Likewise, the other limb of claim no.1 which was with regard to sums demanded equivalent to Rs.10,26,545/- in relation to work done between January - February, 2009, the Arbitrator came to the same conclusion and hence, proceeded to reject the claim.

4.2 In so far as the royalty was concerned, the entire sum as claimed (i.e. Rs.88,314/-) was allowed while, with regard to claim for materials issued and other dues the amount awarded was a sum of Rs.3,46,502/- against a demand for a sum of Rs.4,25,527/-.

4.3 The sum total of the aforesaid was, as indicated above, that under claim no.1, the petitioner has been awarded a sum of Rs.4,34,816/-.

4.4 Claim no.2 for loss of profit, amounting to Rs.1,20,00,000/-, was rejected in its entirety.

4.5 Interest, as indicated right at the outset, has been allowed in favour of the petitioner under claim no.3, albeit, at the rate of 12% per annum.

5. As far as the counter claims were concerned, the learned Arbitrator awarded amounts under three heads for BOQ items as per Annexure-1, which was a sum equivalent to Rs.6,62,62,359/-. Towards revision in rate, a sum of Rs.1,04,60,115/- was awarded while towards extra items claim in the sum of Rs.1,75,59,585/- was allowed. The sum total of this, which was an amount equivalent to Rs.9,42,82,059/-, was adjusted for money already received by the respondent from the claimant, which was an amount of Rs.8,68,86,279/-. Thus, the learned Arbitrator came to the

net figure payable to the respondent against counter claim which, as indicated above, is a sum of Rs.73,95,780/-. This amount was adjusted against the amount payable by the respondent to the petitioner bringing the net amount payable by the petitioner to the respondent to a sum of Rs.69,60,964/-. On this amount, as indicated at the outset, interest at the rate of 12% was awarded.

6. Given this background, Mr. Upadhyay, who, appeared for the petitioner, confined his challenge to only two aspects. First, with regard to rejection of the first limb of claim no.1, which, related to money withheld, and second, with regard to grant of moneys to the respondent towards extra items.

6.1 It was Mr. Upadhyay's submission that in so far as rejection of the claim made by the petitioner towards money withheld by BGHPL was concerned, the same should have been awarded as the respondent was solely responsible for BGHPL retaining the said amount.

6.2 It was Mr. Upadhyay's submission that since the respondent had not assigned the insurance policy in favour of BGHPL, the retention money was not released by BGHPL.

6.3 As regards the decision of the learned Arbitrator to allow the respondent's claim for extra items was concerned, Mr. Upadhyay submitted that the same was contrary to the terms of the contract. For this purpose, Mr. Upadhyay referred me to the Piece Rate Contract (PRC) dated 22.09.2005, executed between the petitioner and the respondent. In support of his submission, Mr. Upadhyay drew my attention to the following recitals in the PRC: -

“...The unit rates in the works order are inclusive of shift work, overtime work, night work etc. and nothing extra is to be paid over the rates mentioned therein.

The quantities mentioned in the work order are tentative and likely to change. Himalaya is not entitled for any increase in the rates on this account...”

6.4 Besides this, reference was also made by Mr. Upadhyay to Clause 6 of the PRC, which reads as follows: -

“6. Akhit in consultation with Himalaya shall submit claim(s), if any, to BGHPL. The payment when received from BGHPL for the settlement of any claim(s) shall be shared on 50:50 basis by both parties after deducting the expenditure as mutually agreed by both the parties.”

(emphasis is mine)

6.5 Based on the aforesaid recitals and, in particular, Clause 6 of the PRC, Mr. Upadhyay submitted that the learned Arbitrator had committed an error as he had failed to adhere to the principle engrafted therein, which is, that the payment received from BGHPL had to be shared equally i.e. in the ratio 50:50.

7. Mr. Mehta, who, argued on behalf of the respondent contended to the contrary. It was his contention that in so far as the rejection of the petitioner’s claim for retention money was concerned, the learned Arbitrator reached a correct conclusion in view of the fact that the respondent was not a party to the Settlement Deed dated 25.03.2009, (in short “Settlement Deed”) reached between BGHPL and the petitioner.

7.1 Besides this, it was submitted that the insurance policy was taken out by the petitioner and the premium for the same was paid by it after deducting the same from the running bills of the respondent. For this

purpose, reference was made to Clause XI of the Settlement Deed. In other words, the argument was that it was the obligation of the petitioner to comply with the terms of the settlement for release of the moneys withheld by BGHPL, which required the petitioner to provide the necessary indemnity and assign the insurance policy in favour of BGHPL. Mr. Mehta submitted that since the petitioner had failed to comply with the terms of the settlement arrived at with BGHPL, the claim for money withheld rejected by BGHPL qua which the respondent could not be held liable.

7.2 As regards the other direction contained in the impugned award, which required the petitioner to pay the respondent moneys towards extra claims, Mr. Mehta, argued that the learned Arbitrator and allowed this claim based on material placed on record and concluded that since there was no agreement arrived at between the petitioner and the respondent as regards the expenditure incurred, the amount payable to the respondent was divided into three categories, and thereafter, directions were issued as to the manner in which the money received from BGHPL had to be shared between the respondent and the petitioner.

7.3 It was Mr. Mehta's submission that the view taken by learned Arbitrator had both merit and was fair, as also, was in consonance with the provisions of the contract.

8. I have heard learned counsel for the parties and perused the record. In my view of the petitioner's submission on both counts is fallacious and thus, will have to be rejected.

8.1 Before I proceed, it may be important to note the following broad facts which obtain in the matter.

8.2 A Memorandum of Understanding dated 15.9.2005 ('MoU') was executed between BGHPL and the petitioner, whereby, the entire civil engineering works was awarded to the petitioner on the terms and conditions stipulated therein.

8.3 The formal contract, however, between BGHPL and the petitioner was executed on 18.10.2005. The petitioner, in turn, entered into a sub-contract i.e., PRC, with the respondent for execution of the very same civil engineering works. The sub-contract between the petitioner and the respondent was executed on 22.9.2005, for a value of approximately Rs.9.361 Crores.

8.4 The respondent was required to execute the subject works as per the quantities and the rates adverted to in Annexure-1 appended to the PRC. Under the PRC, the respondent was given 540 days from the date of handing over of the site to fulfil his mandate.

8.5 The record shows that the disputes emerged between the petitioner and the respondent.

8.6 Broadly, it was the petitioner's case that the respondent had overreached the petitioner and had begun to deal directly with BGHPL; a circumstance which resulted in the foreclosure of the contract executed between BGHPL and itself. It is in this background that the claims and counter claims were filed before the learned Arbitrator.

8.7 Insofar as the reasons as to why I would reject the submissions advanced on behalf of the petitioner with regard to the aspects alluded to above, the same are set forth hereafter.

9. In so far as the petitioner's grievance with regard to rejection of its claim for payment against the money retained by BGHPL is concerned, the learned Arbitrator noticed the Clause XI of the Settlement Agreement as entered into between the petitioner and BGHPL whereby the MoU and the subsequent agreement dated 18.10.2005 were foreclosed. For the sake of convenience, the said clause is extracted hereafter: -

“XI. Retention money of M/s Akhit Construction Pvt. Ltd. amounting to Rs.50,89,280/- shall be release to M/s. Akhit Construction Pvt. Ltd. 10.04.2009 will be however subject to receipt of indemnity assignment insurance policy as stated above.”

(emphasis by mine)

10. As is evident on a bare perusal of Clause XI of the Settlement Agreement, the release of money retained by BGHPL depended on the petitioner furnishing an indemnity and assigning the insurance policy in favour of BGHPL. It is not in dispute that BGHPL had no privity of contract with the respondent. The respondent was not a party to the settlement agreement.

10.1 The learned Arbitrator has returned a finding of fact that the insurance policy was taken out by the petitioner and that the insurance premium was paid by the petitioner after adjusting the same from the running bills of the respondent. In these circumstances, as held by the

learned Arbitrator, the respondent could not be held liable for denial of claim qua the money withheld by BGHPL. Besides this, as noted by the learned Arbitrator the petitioner having triggered arbitration *vis-à-vis* BGHPL this claim, if otherwise tenable, could always be made against BGHPL by the petitioner.

11. In my view, no fault can be found with the view taken by the learned Arbitrator in respect of this claim.

12. As regards claim for extra items, the learned Arbitrator has once again taken a view based on his appreciation of the terms of the PRC obtaining between the respondent and the petitioner.

12.1 The learned Arbitrator has enunciated his view as to why the moneys received from the BGHPL could not be shared equally, as contended by Mr. Upadhyay based on Clause 6 of the PRC.

12.2 Since, these were extra items, the argument advanced by Mr. Upadhyay that no additional sums would be payable, in my view, is not tenable.

12.3 The reasoning given by the learned Arbitrator is set out in paragraph 16.2 of the award. As would be evident from the reasoning given by the learned Arbitrator, where the extra item rate approved by BGHPL was lower than the analysis of rate provided by the respondent to the petitioner the amount received from BGHPL has been paid in the ratio of 91:9 i.e. 91% to be paid to the respondent with the balance 9% being paid to the petitioner.

12.4 However, where the rates awarded by BGHPL for extra items were higher than the rates submitted by the respondent to the petitioner, the cost factored in the respondent's analysis of rate has been deducted and from the profit so determined (qua the quantity of items executed) has been awarded in equal measure to the petitioner and the respondent i.e. in the ratio of 50:50. Furthermore, in cases where analysis of rate has not been provided 91% of the amount has been awarded in favour of the respondent.

12.5 For the sake of convenience, the relevant part of paragraph 16.2(ii) of the award is set forth hereafter: -

“...At this stage, we may notice the submission of the Claimant with regard to extra items. It was contended by the Counsel that all the proceeds received from BGHPL towards extra items would be shared equally between the Claimant and Respondent, after deducting expenditure incurred as mutually agreed for execution of the extra item. In the instant case, no mutual agreement had been arrived at regarding the expenditure incurred. Therefore, in the absence of this, Counsel for the Claimant urged that the total amount received for extra items from BGHPL was to be shared equally. This argument has only to be stated to be rejected. The PRC provided that the payments received from BGHPL for extra items after deducting the expenditure as mutually agreed was to be shared equally. It does not mean that if there was no agreement on the amount of expenditure then the total amount received is to be shared equally without deducting the expenditure on execution incurred by the Respondent. A proper and harmonious interpretation of the clause is that the profits are to be equally shared after deducting the expenditure to be mutually agreed. In case, agreement as to the expenditure is not arrived at then it could be assessed as per the analysis furnished to BGHPL. For items, where no analysis of rates is given, the approach Tribunal has adopted is to follow

broadly the pattern of sharing as per the BOQ rates i.e. 91% of the amount received by Claimant from BGHPL be paid to the Respondent. We have proceeded to calculate the amount payable to the Respondent on account of extra items by considering them in three categories:

a. Where the approved extra item rate by BGHPL is lower than the analysis of rate as provided by the Respondent to the Claimant.

b. Where the approved extra item rate by BGHPL is higher than the analysis of rate as provided by the Respondent to the Claimant.

c. Where the Respondent has not furnished any analysis of rate.

(a) For items in category (a) since the analysis of rates claimed by the Respondent was higher than the one received from BGHPL.

Claimant to retain 9% of the total amount received from BGHPL and remitting the balance to the Respondent. This would be in consonance with the Piece Rate Contract pattern.

(b) In (b) category, the rates granted by BGHPL are higher than the analysis of rates submitted. The approach adopted is to take the cost from the Respondent's analysis of rate and after deducting the same from the approved rate determine the profit for the quantity of items executed and award 50% of the profit to the Respondent and 50% to the Claimant.

(c) In (c) category, where analysis of rate have not been provided. We have followed the pattern of parity with the piece rate contract and awarded 91% of the amount to the Respondent..."

13. In my opinion, the view taken by the learned Arbitrator is a plausible view. Therefore, the submission of Mr. Upadhyay will have to be rejected with respect to this claim as well.

14. Accordingly, for the foregoing reasons, in my opinion, there is no merit in the petition, the same is consequently dismissed. Pending application(s) shall also stand closed

15. There shall, however, be no order as to cost.

**RAJIV SHAKDHER
(JUDGE)**

JULY 16, 2018

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