

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

+ **O.M.P.(COMM.) 38/2018**

Reserved on: 9th February, 2018
Date of decision: 23rd February, 2018

SUBHASH INFRAENGINEERS PVT. LTD. Petitioner

Through: Mr. Anil Mittal, Adv.

versus

UNION OF INDIA

..... Respondent

Through: Mr. Jagjit Singh, Mr. Narayan Dev,
Advts. for Railways.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Award dated 24.08.2017 passed by the Sole Arbitrator in the Arbitration Proceedings held between the parties.
2. The disputes between the parties relate to the Award of work of earth work in filling, embankment and cutting, provision of the blanketing material, construction of bridges and other allied works between K.M 49.00 to K.M 74.4 on Rewari - Jhajjar - Rohtak section in connection

with Rohtak - Jhajjar - Rewari new railway line in favour of M/s Subhash Chander & Co. (the predecessor of the petitioner, herein).

3. The entire work were required to be completed within 18 months from the date of issue of acceptance letter dated 04.07.2007 i.e. on or before 03.01.2009. The work was, however, completed on 28.02.2011. During the execution of the work, the respondent granted the first Extension of Time vide its letter dated 12.02.2009 without levy of penalty and with the benefit of Price Variation Clause (PVC). Thereafter, further extension was granted vide letters dated 04.08.2009, 07.08.2009, 10.03.2010 and 20.06.2010, again without penalty, however, without the benefit of PVC. By letter dated 17.03.2011, *ex post facto* extension was granted by the respondent, again without penalty, however, without the benefit of PVC. The second and final Addendum cum Corrigendum to the Contract Agreement was executed between the parties on 14.10.2011 and the final payment of Rs.54,59,691/- was released in favour of the petitioner.

4. The petitioner, *inter-alia* claiming that, as the delay had occurred due to the reasons attributable to the respondent, therefore, the petitioner was entitled to the extension of time with PVC, raised various claims and this Court vide order dated 10.02.2014 passed in Arb. P.234/2013 appointed the Sole Arbitrator to adjudicate the disputes that had arisen between the parties.

5. The Arbitrator by way of the Impugned Award has rejected all the claims of the petitioner.

6. The primary contention of the petitioner against the Impugned Award is that the Arbitrator has failed to consider that the delay in

execution of the work was for the reasons attributable to the respondent and it is for this reason that, while granting extension of time, the respondent had not levied any penalty on the petitioner. The challenge to the Impugned Award on this aspect can be better appreciated from the following paragraph of the petition:

“The inference drawn by the Ld. Arbitrator is not based on the facts and material placed on record and it is against the public policy as brought out at para 6, the delay in completion was due to non release of drawings, non completion of the bridges work interested to other agencies. The inference of the Arbitrator that the claimant did not protest against the denial of price variation clause till February, 2012 is in correct. The protest were made vide letters dated 13-8-2010, 22-11-2010, 10-1-2011 and 17-5- 2011. Copies of letters dated 13-8-2010, 22-11-2010 and, 10-1-2011 are collectively Annexure-M hereto. It may be mentioned here that even in letter dated 29-11-2010 (Annexure-G) also it has been confirmed by the respondent that the request for PVC made by the claimant vide letter dated 13-8-2010 was being examined and accordingly action will be taken.”

7. I am unable to agree with the submission made by the learned counsel for the petitioner. The Arbitrator in his Impugned Award has considered the entire correspondence exchanged between the parties. The Arbitrator has also, on merit, considered the reasons given by the petitioner for claiming that the delay had occurred due to defaults of the respondent. The Arbitrator has relied upon the declaration submitted by the petitioner in the prescribed Proforma Declaration “Annexure-C” of the tender declaring that the petitioner had made itself conversant with the condition like Topography of air, Soil strata at site of work, sources

and availability of construction materials, etc. The Arbitrator has further found that it was the petitioner who had failed to carry out the work with expedition even after the supply of L-Section of KM 49 to KM 60 by the respondent to the petitioner. The Arbitrator has further discussed the evidence led by the parties even in relations to the other area of land handed over by the respondent to the petitioner and concluded that the petitioner had been unable to show the engagement and deployment of sufficient manpower and machinery at the site of the work. The Arbitrator concluded that in absence of such evidence, it must be held that the petitioner had not deployed adequate machinery and manpower for execution of the earth work and embankment in terms of the Letter of Acceptance dated 04.07.2007 and Contract Agreement dated 13.02.2008 and delay in the execution of the work is directly attributable to the petitioner.

8. As far as the delay in supply of drawing of bridges by the respondent is concerned, the Arbitrator has again discussed in the Impugned Award the effect thereof and the correspondence exchanged between the parties to re-emphasize that the delay in execution of the work was directly attributable to the petitioner. Paragraph 49 of the Impugned Award is reproduced herein below:

“49. There is no doubt that there was some delay in supply of drawings of the bridges required to be constructed but the claimant cannot take advantage of the same because M/s.Subhash Chander & Co. failed to carry out the work in accordance with terms and conditions of LoA and the Contract Agreement and could construct only 35 minor bridges and that too after grant of four extensions and one post facto extension on the

basis of written requests made by M/s. Subhash Chander & Co, While granting first extension vide letter dated 12.02.2009 the competent authority had taken cognizance of the fact that there was some delay on the part of the respondent in supplying the drawings of bridges and this is the precise reason why the benefit of price variation clause was given to the claimant and a sum of Rs.64,89,807.54 was paid in terms of price variation clause. However, all subsequent extensions were granted without the benefit of price because the concerned authority was convinced that M/s. Subhash Chander & Co. had failed to carry out the work with a due diligence. This is amply proved from letters dated 04.08.2009 (Annexure R-2/ 2) dated 17.08.2009 (Annexure R-2/1), 10.03.2010 (Annexure R-2/3), 29.06.2010 (Annexure R-2/4), 17.03.2011 (Annexure R-2/5). Apart from these letters, the concerned authority had made request to the claimant vide the letters dated 30.07.2008 (Exhibit RW-1/7), 27.12.2008 (Exhibit RW-1/8), 22.01.2009 (Exhibit RW-1/9), 30.10.2009 (Exhibit RW-1/10), 23.07.2010 (Exhibit RW-1/11), 09.08.2010 (Exhibit RW-1/12), 12.11.2010 (Exhibit RW-1/13), 20.10.2010 (Exhibit RW-1/14), 29.11.2010 (Exhibit RW-1/15), 25.07.2011 (Exhibit RW-1 /16) and 29.09.2011 (Exhibit RW-1/18). When the claimant made representation dated 12.05.2011 for grant of the benefit of PVC on extended period of contract, the Headquarter Office of the Northern Railway specifically rejected, the same vide letter dated 22.06.2011 (Annexure R - 6) by pointing out that approved section was finalized in November 2007. The drawings of the bridges were given in stages to commensurate with the progress of the work at the site and complete set of drawings were given in February 2008, but even then the progress of bridges were very poor and took it nearly three years to complete the same. It was also mentioned that some investigation was got done by M/s Subhash Chander & Co. as non-schedule item, but it was in no way handicapped in constructing tile bridges when there was no loss on

account of idling of labour, payment due to PVC and in fact the work of the progress was very poor. It is quite interesting to note that M/s Subhash Chander & Co. did not protest against the denial of the benefit of price variation clause in second, third, fourth and fifth extensions till February 2012 . This goes a long way to show that delay in the execution of work was directly attributable to claimant.”

9. It cannot, therefore, be said that the Arbitrator has failed to consider the evidence led before him. As far as the plea that the inference drawn by the Arbitrator from the documents is incorrect, it is only stated to be rejected. This Court in exercise of its power under Section 34 of the Act does not sit as a Court of Appeal against the Arbitral Award. The Arbitrator is the final Judge of the evidence led before him. He is the ultimate master of the quality and quantity of the evidence to be relied upon and it is not for this Court to re-assess or re-appreciate such evidence (*Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49).

10. Even on facts, I do not find the view taken by the Arbitrator to be incorrect in any manner, so as to call any interference from this Court in exercise of its power under Section 34 of the Act.

11. In respect of denial of claim no.4, the petitioner in this petition has alleged that the Arbitrator has erred in rejecting the said claim placing reliance upon the Clause 39.6 of the special-data and specification of the tender condition which formed part of the Contract Agreement. The petitioner has contended that the said claim has been rejected by taking wrong interpretation of the said clause. In *Associate Builders (supra)*, the Supreme Court has cautioned that construction of the terms of the

contract is primarily for the Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. The petitioner has not been able to make out a case falling under the above exception and therefore, the Impugned Award, so far as it rejects the claim no.4 of the petitioner, cannot be faulted.

12. The next challenge of the petitioner is to the rejection of claim no.5 by the Arbitrator. This claim was for extra payment for bringing material from Rajasthan resulting in additional costs to the petitioner. The Arbitrator has, after discussing the evidence led by the parties, held that the Circular dated 28.02.2010 issued by the Director Industries and Commerce, Mines and Geology, Haryana cannot be relied upon by the claimant in support of its claim for extra expenditure incurred in procuring the material from Tiba Basi in Rajasthan. The Arbitrator has further discussed the evidence led by the petitioner in support of quantification of the said claim and held that there was a serious doubt on the authenticity of the documents relied upon by the petitioner in support of said claim and even otherwise there was no evidence on record to show that the material allegedly transported by M/s Ashok Kumar and M/s Prem Engineers had actually been unloaded at the site of the work in Jhajjar, Haryana and used by the petitioner for embankment. The petitioner, by way of the present objection is again wanting this Court to re-appreciate the evidence that was led before the Arbitrator. Such exercise cannot be done by this Court in exercise of its power under Section 34 of the Act. I see no merit in the challenge to the above findings.

13. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 23, 2018/Arya

