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

COMMERCIAL ARBITRATION PETITION NO. 953 OF 2018
WITH
NOTICE OF MOTION (ST) NO. 2336 OF 2018

Nuclear Power Corporation of India Ltd. ...Petitioner
vs.
M/s.Vasu Chemicals ...Respondent

Mr.Assem Naphade with Kavita Anchan and Arsh Misra I/b. V.Kini & Co. for Petitioner/Applicant in NMCDL 2336/2018.
Mr.Rohan Cama with Vinod Agarwal, Khushboo Tatia, Rahul Jain I/b. VBA Legal for Respondent .

CORAM : S.C. GUPTE, J.

DATE : 5 SEPTEMBER 2019

P.C. :

Heard learned Counsel for the parties.

2 This petition challenges an award passed by a sole arbitrator in a reference between the parties arising out of a works contract.

3 Tenders were invited by the Petitioner for bio-fouling control at its units of TAPS-3&4 by dosing of chlorine dioxide with existing chlorination plant & operation & maintenance of chlorination plant & supply, installation and operation & maintenance of chlorine dioxide system. The work was of an estimated cost of about Rs.30.33 crores. The completion time was 30 calendar months. The Respondent was the successful bidder, who was awarded the contract. The disputes between the parties mainly concerned two types of claims made by the Respondent contractor. The first was for escalation and the second for payment for additional works whilst executing the contract.

4 So far as the claim of escalation is concerned, It is the case of the Petitioner employer that the particular contract, namely, work order nos.22 and 23, did not provide for any escalation. It is submitted that in the absence of an express provision in the contract, one could not imply a term for escalation, since any such implication would be against the express clause of lump sum price fixed for the contract irrespective of its duration. It is important to note that the escalation claim was made in respect of two particular orders forming part of the contract, namely, work order nos.22 and 23, both of which were for a duration of more than twelve months. Accordingly, even as per the General Conditions of Contract ("GCC") applicable to the execution of the work order, not only was there no prohibition for claiming escalation but there was a positive provision that escalation could be claimed.

5 Besides, as observed by the learned Arbitrator, as regards work order no.22 though there was no mention of escalation in the work order, the original clause contained in the contract document, namely, clause no.8.1.2 of Section 8 of the contract document, which provided that "the rates quoted will remain firm till completion of the contract" and "no escalation in rates will be allowed", was deleted in an amendment issued subsequent to the pre-bid meeting between the parties. The learned Arbitrator observed that it was on the basis of this deletion that the offer was made by the Respondent contractor to carry out the work. The Arbitrator observed that in addition to this aspect, various components of skilled as well as unskilled labour were also specified in the minutes of pre-bid meeting. The Arbitrator, in the premises, concluded that escalation would be applicable for work order no.22. The Arbitrator observed that there was no justifiable reason provided by the employer for non-applicability of price escalation

clause or keeping the quoted price firm. The analysis of the learned Arbitrator as well as the conclusion drawn by him on the basis of the material produced by the parties before him, clearly exhibits a possible view of the material. It can neither be described as an impossible view or a view, which no fair or judiciously minded person would take of the material.

6 So far as work order no.23 is concerned, the learned arbitrator, apart from placing reliance on deletion of clause 8.1.2, considered above in connection with work order no.22, observed that the tender was issued, pre-bid meeting held and addendum was issued in October 2008, whereas Letter of Intent was issued in April 2010 and work order no.23 commenced in 2011. The arbitrator noted that the work orders having been issued after the pre-bid meeting and under a single tender, they must accord with the same. The Arbitrator noticed that when three work orders were silent on the price remaining firm and only one work order mentioned that 'no escalation in rates will be paid', it clearly appeared to be in contradiction with the agreement between the parties. The Arbitrator noted that the final offer was submitted in November 2008, whilst the purchase order was placed in April 2010 and thus, there was a large time-gap between the dates of receipt of offer and placement of purchase order. The Arbitrator observed that in the premises, the interpretation that the prices were to remain firm, even after a period of three to six years (the period of execution being of three years) from the date of submission of the offer was not in accordance with justice or equity. Thus, after going through all the documents on record and considering the pleadings and arguments of both parties, the Arbitrator held that the Claimants were entitled to price escalation even under work order no.23. The question then was of quantification of such escalation. Having gone through price escalation calculations furnished by the

Claimants, the Arbitrator observed that the base indices to be considered for such calculation, as per stipulations of the GCC, were in order. The base indices would be of October 2008 and accordingly, various relevant indices for escalation calculations were worked out by the learned Arbitrator as admissible under the contract as per the relevant clause of the GCC and the relevant components expressed as percentage value for various materials, were determined. The relevant indices were taken from published information of Government of India, which was enclosed along with the calculations. The arbitrator appears to have, thus, duly applied his mind to the relevant material and come to a fair and reasonable finding.

7 Learned Counsel for the Petitioner submits that no term could be implied in a contract which would have the effect of militating against an express clause. Learned Counsel relies on the judgment of the Supreme Court in the case of **Nabha Power Limited (NPL) vs. Punjab State Power Corporation Ltd. (PSPCL)**[1] in support of his submission. The Supreme Court in this case referred to the “five condition test” for an implied condition to be read into the contract. One of the five tests is that such condition must not contradict any express term of the contract. The express clause, which learned Counsel refers to here, is the price stated in the contract as lump sum price. What is important to note is that the escalation awarded by the learned Arbitrator was on the footing that there was a time lag between the receipt of offer and the placement of work order and that the work order was for a period which admitted of escalation under the GCC. On this basis, the learned arbitrator awarded escalation. This is not a case where escalation was prohibited under any express term of contract. Accordingly, it cannot be said that the escalation awarded was in breach of any express term of the contract. The judgments of

1 **(2018) 11 SCC 508**

Mumbai Metropolitan Region Development Authority vs. Unity Infraproject Ltd.[2] and **N.J. Devani Builders P.Ltd. vs. Indian Farmers Fertilizer Co-op. Ltd.**[3]**,** relied upon by learned Counsel for the Petitioner, are generally on the concept of a lump sum contract. These judgments indicate that in case of a lump sum contract, no escalation is generally admissible. These judgments do not rule against the conclusions arrived at by the learned arbitrator in the particular circumstances of the case on hand.

8 Coming now to the claim of extra work, there was no dispute between the parties as to the quantum of work; such quantum was even certified in a certificate issued by the Petitioner employer to the Respondent. It also cannot be disputed that the work executed by the contractor was beyond the accepted variation and accordingly, called for treatment as extra work. The submission of the Petitioner is that clause 11 of the GCC provided for variation of the scope of work only at the instance of the Engineer-in-charge. If the Engineer-in-charge wanted any additional work to be done on his instructions, the GCC provided for due approval of the drawings and execution of the work by the contractor in accordance with such approved drawings. It is also submitted that if quantities to be executed at site exceeded the contractual limits, the Respondent contractor had to give notice to the employer of its intention to claim additional sums and submit a proper rate analysis. The Engineer-in-charge was then to determine the rate after considering the rate analysis submitted by the contractor. It is submitted that none of these contractual stipulations was followed in the present case by the Respondent contractor and, in the premises, no amount could be claimed for extra work. The Arbitrator observed that the completion certificate issued by the Petitioner employer clearly stated that the work done actually included the extra work for

2 **2008 SCC OnLine Bom 190 : (2008) 5 Bom CR 196 : (2008) 4 Arb LR 313**
3 **2012 SCC OnLine Del 6046 : (2013) 133 DRJ 559 : (2013) 196 DLT (CN B) 28**

which claim was made by the contractor. The arbitrator observed that the certificate had included not only the tender work but even the extra or additional work, which implied that the job had been executed as per instructions of the Petitioner employer and as per approved drawings and that measurements of the work executed were derived from approved transactions. The learned Arbitrator then considered the various measurements and found them to be as per the approved drawings. Detailed workings of the amounts payable for extra work executed under the contract were furnished by the Petitioner; these were taken on record as an exhibit; and after making comparison between the amounts calculated by the claimants and those calculated by the Respondents, the learned Arbitrator worked out the actual amounts payable to the contractor on account of extra work. In fact, both parties appeared to have agreed to leave this exercise to the learned Arbitrator. The Arbitrator, accordingly, computed the amounts payable towards extra work claimed by the contractor. In the premises, no infirmity can be found with the assessment of compensation in the award within the parameters of the law of challenge to an arbitration award under Section 34 of the Arbitration and Conciliation Act, 1996. The analysis as well as the finding arrived at by the learned Arbitrator exhibits a clearly possible view and not an impossible or perverse view.

9 Learned Counsel for the Petitioner relies on the case of **Associate Builders vs. Delhi Development Authority[4].** Relying on this case, it is submitted that findings rendered by the learned Arbitrator in this behalf ignore vital material such as the applicable clauses of the contract. Learned Counsel, in this behalf, refers to clauses 13.3, 13.4 and 3.35 read in the light of various definitions contained in clauses 1.1.5, 1.1.41, 1.1.43, 1.1.44 as also, in particular,

4 **(2015) 3 SCC 49**

clauses 11.2.1, 11.3. Learned Counsel is not right in submitting that any of these clauses was ignored by the learned Arbitrator. The award of the learned Arbitrator on extra work does not appear to fall foul of any of these clauses. Even if there is no written notice of intention to claim any additional sum for this extra work on the part of the contractor, what the learned Arbitrator has concluded is that based on the material placed by the parties before him, it was apparent that the job had been executed as per the instructions of the employer and as per the approved plans. There was no question of submitting any separate rate of analysis, since the work was essentially contract work. What was claimed as extra was the quantity beyond permissible variation and not an altogether different work. So far as working out of the actual amount for extra work is concerned, obviously, the parties had left it to the learned Arbitrator. In the premises, the conclusion of the Arbitrator on the extra work cannot be faulted on the basis of the law stated by the Supreme Court in the case of **Associate Builders** (supra).

10 The other claims awarded by the learned Arbitrator are of minor amounts, namely, Rs.96,303/- and Rs.50,000/-. No concrete submissions have been formulated to challenge these two claims. Hence, nothing in particular needs to be considered in respect of these two claims.

11 There is, accordingly, no merit in the Petitioner's challenge. The commercial arbitration petition is, accordingly, dismissed.

12 In view of the disposal of the commercial arbitration petition, the notice of motion does not survive and is dismissed.

(S.C. GUPTE, J.)