



2024:DHC:9671



\$~51

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

Date of decision: 18th NOVEMBER, 2024

IN THE MATTER OF:

+ **O.M.P. (COMM) 485/2024 & I.A. 45111/2024, I.A. 45112/2024,
I.A. 45113/2024, I.A. 45114/2024**

UNION OF INDIA & ANR.

.....Petitioners

Through: Mr. Niraj Kumar, Sr. Central Govt.
Counsel with Mr. Chaitanya Kumar,
Advocate.

versus

M/S AHLUWALIA CONTRACTS (INDIA) LTDRespondent

Through: Mr. Dhruv Rohatgi and Mr. Mritunjay
Kumar Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. This is a petition under Section 34 of the Arbitration & Conciliation Act, 1996 filed by the Union of India challenging an Award dated 31.05.2024 passed by the Arbitral Tribunal.
2. The challenge in the present petition is limited to Claim No. G and Claim No. P (partially for the interest awarded in respect of Claim No. G).
3. The facts of the case leading the present petition are that the Union of India invited tenders for construction of head office building of Punjab National Bank at Plot No. 04, Sector-10, Dwarka, New Delhi at the cost of Rs.185,48,51,843/- including civil and electrical works. The Respondent made a bid for the said tender and the bid of the Respondent was accepted.



2024:DHC:9671



4. An agreement bearing No. 01/EE/PNBPD-1/2014-15 was signed between the Respondent and the Petitioner and the work commenced on 02.08.2014.
5. It is stated that the work was completed on 31.07.2017 and the Final Bill for Rs. 18,80,08,713/- was submitted by the Respondent. It is stated that the Union of India processed the Final Bill of Rs.8,24,30,807/-.
6. It is stated that the Respondent invoked the Dispute Resolution Clause 25 of the General Conditions of Contract (GCC) for adjudication of Claim of Rs.46,59,97,319/-.
7. Since the Arbitrator was not appointed by the Petitioner, a petition under Section 11(6) of the Arbitration & Conciliation Act was preferred and this Court *vide* Order dated 24.11.2020 appointed a Sole Arbitrator. The mandate of the Arbitrator was extended from time to time. Finally, Award dated 31.05.2024 was passed by the Arbitral Tribunal.
8. Claim No. G relates to the claim towards procurement of water use for curing fresh concrete masonry surface and Claim No. P is towards interest awarded in respect of Claim No. G.
9. It was the case of the Respondent before the Arbitrator that the Respondent/Claimant used to procure freshly installed concrete/masonry surface in the water based pigmented wet curing compound in terms of the Bill Of Quantity (BOQ) Item No.3.13.1.
10. It is stated that on the direction of the Engineer-in-Charge, they had to use ordinary water for procuring the fresh concrete which was outside the scope of the BOQ and the Claim of Rs. 84,01,417/- has been raised by the Respondent/Claimant towards procurement of water. The said Claim was raised in the Final Bill which has been denied.



2024:DHC:9671



11. The Union of India denied the claim by relying on Clause 31 of the General Conditions of Contract which requires that the contractor to make his own arrangement of water required for the work and nothing extra was to be paid for the same. It was contended the concrete/masonry surfaces with water based curing compound was to be executed by the Respondent/Claimant at all such locations as per the directions of the Engineer-in-Charge which is stipulated in Item 3.13.1 of the BOQ. It is stated that in certain areas where curing was to be done by the Claimant with fresh water as per specification of the item, the water was to be arranged by the Claimant as per the provisions of Clause 31 of the GCC.

12. Evidence was led by the Claimant by examining Sh. Chintamani Sharma (CW-2). The Arbitrator in his award has summarised the cross-examination of CW-2 and has observed that on being asked that curing period and methods were already prescribed in items like RCC, Brick work, plastering etc., as per the CPWD Specifications 2009, CW-2 maintained that as per the BOQ Item 3.13.1, the Claimant was to use freshly installed masonry surface with a pigmented wet curing compound instead of curing merely with water. It is stated that CW-2 had stated that the Petitioner herein advised water to be used for curing instead of curing compound.

13. The Arbitrator has summarized the cross-examination of CW-2 as under:-

“3. As per Cross Examination: The Claimant submitted an affidavit of his witness Sh. Chintamani Sharma (CW-2). He was cross examined on the present claim on 15.10.2022 and 29.10.2022 (refer answers of CW-2 to Q Nos. 58-63, 65-66 and 70).

4. On being asked that curing period and methods were



already prescribed in items like RCC, brick work, plastering, etc., as per CPWD Specifications 2009, the CW-2 maintained that, as per BOQ Item No. 3.13.1, the Claimant was supposed to cure the freshly installed masonry surface with a pigmented wet curing compound, instead of curing merely with water. Accordingly, the Claimant executed the work and billed the Respondents and one such bill was also cleared related to usage to compound for curing. Subsequently, the Respondents advised that water be used for curing, instead of compound. The Claimant accordingly used water for curing later; however, the Respondents did not clear subsequent bills for usage of water. Incidentally, the use of compound was initially prescribed in the contract because there was shortage of water in the area where the project was to be executed. (refer answer of CW-2 to Q No. 59).

5. The CW-2 stated that it was incorrect to say that, under Clause 31 of the GCC (refer pg. 930 Annex. C-4 Vol. 5), the Claimant was required to make his own separate arrangements for water required for the work and nothing extra will be paid for the same (refer answer of CW-2 to Q No. 58).

6. The CW-2 also stated that it was incorrect to say that curing of concrete/ masonry surfaces with water-based curing compound was to be executed by the Claimant at certain locations as per the direction of Engineer-in-Charge, while rest of curing was to be done as per specifications (refer answer of CW-2 to Q No. 61).

7. On being asked to explain of this item of work curing, the CW-02 replied that curing of a surface can be either with water or compound, generally speaking. In this project, the Claimant had undertaken to do curing by compound, as required as per BOQ Item No.



2024:DHC:9671



3.13.1, in the tender. After curing a certain area by compound, the Respondents instructed the Claimant to do curing by water in the remaining area, instead of by compound. This entailed an additional cost to the Claimant as water was not a BOQ Item.

8. CW-02 added that curing is defined in para 5.41 of CPWD Delhi Schedule of Rates 2013 as follows:

"5.41 Supplying and applying pre tested and approved water based concrete curing compound to concrete/ masonry surface, all as per manufacturer's specification and direction of Engineer-in-charge:

*5.41.1 Non pigmented wet curing compound sqm
99.85*

*5.41.2 Pigmented wet curing compound sqm
113.80."*

9. CW-02 added that curing is also defined in para 4.2.10 of CPWD Specifications 2009 Vol. 1 as follows:-

"4.2.10 Curing is the process of preventing loss of moisture from the concrete. The following methods shall be employed for effecting curing.

"4.2.10.1 MOIST CURING: Exposed surfaces of concrete shall be kept continuously in a damp or wet condition by ponding or by covering with a layer of sacking, canvas, Hessian or similar materials and kept constantly wet for at least 7 days from the date of placing concrete on case of ordinary Portland cement and at least 10 days where mineral admixtures or blended cements are used. The period of curing shall not be less than



2024:DHC:9671



10 days for concrete exposed to dry and hot weather conditions. In the case of concrete where mineral admixtures or blended cements are used. It is recommended that above minimum periods may be extended to 14 days.

"4.2.10.2 MEMBRANE CURING: Approved curing compounds may be used in lieu of moist curing with the permission of the Engineer-in charge.

Such compound shall be applied to all exposed surfaces of the concrete as soon as possible after the concrete has set. Impermeable membrane such as polythene sheet covering the concrete surface may also be used to provide effective barrier against the evaporation.

"4.2.10.3 Freshly laid concrete shall be protected from rain by suitable covering." (refer answer of CW-2 to Q No. 65)."

14. The Union of India did not produce any witness and has not led any evidence on this. The Arbitrator after recording the submissions made by the Respondent/Claimant and the Petitioner herein placed reliance on item 3.13 and 3.13.1 of the BOQ and Clause 31 of the GCC. The said clause are reproduced as under:-

"3.13. Supplying and applying pretested and approved water based concrete curing compound to concrete/masonry surface, all as per manufacturer's specification and direction of Engineer-in-Charge."

xxx

"3.13.1 Pigmented wet curing compound."

xxx



2024:DHC:9671



“31. The contractor(s) shall make his / their own arrangements for water required for the work and nothing extra will be paid for the same.”

15. The Arbitrator held that the dispute in the present case was with regard to the BOQ Item No. 3.13.1 under which the Claimant had to use water for curing instead of pigmented wet curing compound on the directions of the Engineer in Charge.

16. The Arbitrator was therefore of the opinion that the Claimant had under no circumstances envisaged the use of water and therefore had not factored in the cost of water that was to be used in instead of pigmented wet curing compound in terms of Item No. 3.13.1 of the BOQ. It is stated that the Respondent/Claimant would have only factored in the pigmented wet curing compound in his bill of quantities. The Arbitrator was of the opinion that the water cannot be said to be without cost particularly in areas like Dwarka in Delhi and therefore this was outside the scope of work and the Respondent is entitled to the said amount. The Arbitrator rejected the contention of the Petitioner herein that the BOQ Item No. 1.13.1 under which the compound was to be used only in limited areas.

17. Paragraph 25 to 33 of the Award is reproduced as under:-

“25. We may now address the second question in the claim "G" - whether the Claimant is entitled to Rs. 84,01,417/- towards procurement of water used for curing fresh concrete/masonry surface under the Contract Agreement. The Claimant maintained that pigmented wet curing compound was to be used as per BOQ Item No. 3.13 and 3.13.1, which read as follows:

3.13. Supplying and applying pretested and approved water based concrete curing compound



2024:DHC:9671



to concrete/masonry surface, all as per manufacturer's specification and direction of Engineer-in-Charge."

"3.13.1 Pigmented wet curing compound."

26. The claim was contested by the Respondents on the ground that the nothing extra was payable to the Claimant contractor because the claim was covered under Clause 31 of the GCC which reads as follows:

"The contractor(s) shall make his I their own arrangements for water required for the work and nothing extra will be paid for the same."

27. It is an admitted fact that water was used for curing instead of pigmented wet curing compound against the BOO Item No. 3.13.1 and the Respondents has only one argument in defence - that of Clause 31 of the GCC. It was not maintained by the Respondents that the Claimant had not used water for this curing or that the Claimant had not incurred any cost in procuring water for this curing or that the related bills / invoices submitted by the Claimant were incorrect or forged.

28. A plain reading of Clause 31 of the GCC shows that it was in the scope of the work that the Claimant had to make his own separate arrangement for water required for the work and nothing extra was payable on this account. However, the dispute here is with regards to BOO Item No. 3.13.1 under which the claimant had to use water for curing, instead of pigmented wet curing compound, as per direction of the Respondents. Since Item No. 3.13.1 of BOQ specified that pigmented wet curing compound shall be used, the Claimant under no circumstances can be said to have envisaged in his quoted rate that water will be used, instead of pigmented wet curing compound.



Water is not without any cost, particularly in areas like Dwarka in New Delhi where this work was executed.

29. It is not in dispute that water charges for general use in the project were built into the contract agreement as per Claus 31 of the GCC; however, the claim is. for specific BOO Item No. 3.13.1 for which he had to procure and use water over and above the water used as per Clause 31. In other words, the claim for water is specifically for this item only, instead of for other use of water for which the Respondents had invoked the Cause 31.

30. Moreover, the BOQ Item No. 3.13.1 mentions the quantity for curing as 76,800 sqm. Thus, curing was to be done in as much area. Hence, it cannot be said that curing was to be done with the compound in limited areas only.

31. Further the claimant had notified his claim duly quantified with Analysis of Rate along with tax invoices and water consumption records supplied by tankers (refer pp. 1739-1744 Annex. C-28 Vol.8/Exhibit CW-2/13). Respondent had not questioned these figures.

32. Curing is an essential requirement for structural strength of the construction and the Claimant used water instead of curing compound only on the direction of the Respondents. Being a specific claim for water used for specific item in deviation to Item No. 3.13.1 of BOQ, I find no merit in the arguments of the Respondents.

33. Accordingly, decision on the issue in dispute is as follows:-

i. Held: In view of the above discussion and



2024:DHC:9671



findings, the present claim of Rs. 84,01,417/- of Claim G: towards procurement of water used for curing fresh concrete / masonry surface is allowed. ”

18. Learned Counsel for the Petitioner places reliance on Clause 12 of the GCC which provides that in case of extra items, i.e. those which are in addition to the items contained in the contract, the contractor can claim rates supported by proper analysis for the work. It is stated that the Respondent has not followed the procedure and, therefore, the Respondent is not entitled to any extra amount. He further contends that as per Clause 3.13.1 the curing was to be done with pigmented met compound for an area of 76800 sqm. at the rate of Rs. 31.00/- per sqm. by the Respondent herein but the actual executed quantity against the total area for which the curing was done was 3275.85 sqm. He states that for the balance area of 73524.15 sqm. the curing was done by sprinkling water during August 2014 to December 2016. He further states that the curing water is construction water for which no extra amount can be claimed. Learned Counsel for the Petitioner further states that cost claimed for the water is too high and is not in accordance with the general engineering practice. He, therefore, states that the rates which were quoted could not have been granted. He further contends that if Claim “G” is set aside then the interest on claim “G” could not have been granted.

19. Challenge in the present Petition is only qua Claim “G” which is a claim towards water which was used for curing the construction. The witness of the claimant/Respondent had refuted the claim of the Petitioner that the claimant was required to make his separate arrangement for water required for the work. It is the case of the Respondent, as accepted by the



2024:DHC:9671



Arbitrator, that the curing was to be done by using pigmented met compound and the contractor had given his tender on the basis of the cost of water based pigmented curing compound. It is the contention of the Respondent that it was only on the instructions of the engineers of the Respondent that a major portion of the area constructed was cured by water and not by the pigmented met compound. The learned Arbitrator after considering the rival submissions came to the conclusion that the Respondent had to procure water over and above the water mentioned in clause 3.13.1. The Arbitrator who is a technical person has held that curing was an essential part of the construction and water was used instead of curing compound only on the direction of the engineers, which was over and above Clause 3.13.1. The contention of the Petitioner that the Arbitrator has gone beyond the contract cannot be accepted. The Arbitrator was aware of the provisions of the contract and has applied the provisions of the contract to the facts of the present case. It is well settled and has been laid down by the Apex Court number of times that there are limitations upon the scope of interference on the award passed by the Arbitrator. When the Arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the Court to re-praise the matter as if it was an appeal. It is also well settled that even if two views are possible there is no scope for the court to reappraise the evidence and to take the different view other than that has been taken by the arbitrator. The view taken by the arbitrator is normally acceptable and ought to be allowed to prevail and so long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of the agreement or passes an award in



2024:DHC:9671



the absence of any evidence, which is apparent on the face of the award, the same could be set aside (Refer: Punjab State Civil Supplies Corporation Limited and Another v. Sanman Rice Mills and Others, **2024 SCC OnLine SC 2632**).

20. The Petitioner has not made out any case as to why the award is in conflict with the public policy of India or that there is a contravention of the fundamental Policy of Indian law. In Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd., **(2024) 2 SCC 375**, the Apex Court has held as under:

“35. Sub-section (1) to Section 34 of the A&C Act requires that the recourse to a court against an arbitral award is to be made by a party filing an application for setting aside of an award in accordance with sub-sections (2) and (3) of Section 34. Sub-section (2) to Section 34 of the A&C Act stipulates seven grounds on which a court may set aside an arbitral award. Sub-section (2) consists of two clauses, (a) and (b). Clause (b) consists of two sub-clauses, namely, sub-clause (i) which states that when the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, and sub-clause (ii), which states that the court can set aside an arbitral award when the award is “in conflict with public policy of India”. We shall subsequently examine the decisions of this Court interpreting “in conflict with public policy of India” and the explanation.

37. Explanation to sub-clause (ii) to clause (b) to Section 34(2) of the A&C Act, as quoted above and before its substitution by Act 3 of 2016, had postulated and declared for avoidance of doubt that an award is “in conflict with the public policy of India”, if the making of the award is induced or affected by fraud or



corruption, or was in violation of Sections 75 or 81 of the A&C Act. Both Sections 75 and 81 of the A&C Act fall under Part III of the A&C Act, which deal with conciliation proceedings. Section 75 of the A&C Act relates to confidentiality of the settlement proceedings and Section 81 deals with admissibility of evidence in conciliation proceedings. Suffice it is to note at this stage that while “fraud” and “corruption” are two specific grounds under “public policy”, these are not the sole and only grounds on which an award can be set aside on the ground of “public policy”.

45. Referring to the third principle in Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in State of Haryana v. Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] (for short Gopi Nath & Sons) and Kuldeep Singh v. Delhi Police [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] clarifies that a finding is perverse when it is based on no evidence or evidence which is



2024:DHC:9671



thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral Tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be overturned under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious. Referring to the third ground of public policy, justice or morality, it is observed that these are two different concepts. An award is against justice when it shocks the conscience of the court, as in an example where the claimant has restricted his claim but the Arbitral Tribunal has awarded a higher amount without any reasonable ground of justification. Morality would necessarily cover agreements that are illegal and also those which cannot be enforced given the prevailing mores of the day. Here again interference would be only if something shocks the court's conscience. Further, "patent illegality" refers to three sub-heads : (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with



2024:DHC:9671



the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the Arbitral Tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do.”

21. This Court has carefully gone through the award. It cannot be said that the award is based on no evidence or that the Tribunal has ignored vital evidence in arriving at its decision. The Arbitrator has meticulously gone into the evidence. It is well settled that if there is some evidence which can be acted and relied upon howsoever compendious it may be, the conclusions cannot be termed as perverse and it must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has to necessarily pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. (Refer: Associate Builders v. DDA, (2015) 3 SCC 49).

22. In view of the above, this Court does not find any reason to interfere with the award.



2024:DHC:9671



23. The Petition stands dismissed along with the pending applications, if any.

SUBRAMONIUM PRASAD, J

NOVEMBER 18, 2024

hsk/Rahul

Signature Not Verified

Digitally Signed By: HARIOM
SINGH KIRMOZIYA
Signing Date: 11.12.2024
19:32

O.M.P. (COMM) 485/2024

Page 16 of 16