(2012) 10 DEL CK 0318

In the Delhi High Court

Case No : FAO (OS) 467 of 2010

Director UP Technical Education — APPELLANT

Vs

Rites Ltd. and Another — RESPONDENT

Date of Decision : 15-10-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2012) 10 DEL CK 0318

Hon'ble Judges : Pradeep Nandrajog, J;Manmohan Singh, J

Bench : Division Bench

Advocate : Anil Mittal, for the Appellant; Anil Seth and Mr. M.K. Pathak, Advocates for R-1, for the Respondent

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.

FAO(OS) 467/2010

1. Vide impugned order dated February 05, 2010 the learned Single Judge has held that only a limited issue was called for decision with respect to a petition filed by RITES Ltd. u/s 34 of the Arbitration and Conciliation Act 1996 which challenged an award dated September 24, 2002 published by Shri Arvind Kumar, the learned Sole Arbitrator. The learned Single Judge has noted that the Notice Inviting Tender issued by RITES Ltd. clearly stated that the tenders were being received by RITES Ltd. on behalf of the Government of Uttar Pradesh. The learned Single Judge has noted that even the letter of award dated November 08, 1996 was signed by one Lt. Col. Arun Kumar on behalf of the Government of Uttar Pradesh. The learned Single Judge has further noted that the Director, UP Technical Education Department was issued a notice, in the capacity of respondent No. 2 in the claim petition filed by the claimant Shabir Ahmed and sons. Lastly, the learned Single Judge has noted that the building in question which was constructed by the contractor was belonging to the Technical

Education Department of the State of Uttar Pradesh. Since the award was against RITES, the learned Single Judge has directed that the award stands modified and shall operate against the State of Uttar Pradesh.

2. We note that the building in question was constructed at Almora and falls in the State of Uttrakhand and with the division of assets and liabilities, the ultimate liability, if the impugned order would stand would be that of Uttrakhand.

3. To put it pithily, view taken by the learned Single Judge is that the RITES has acted as the agent of the Technical Education Department of the State of Uttar Pradesh, which as principal would be liable under the contract in question.

4. Now, the order as penned by the learned Single Judge may appear to be technically correct, but we find that RITES did not plead as aforesaid before the learned Arbitrator. It did plead that the work was being executed for the benefit of the Technical Education Department of the State of Uttar Pradesh, but we find that RITES had raised four counter claims, and surely RITES could not have so done if it projected before the Arbitrator that no award could be made against it since it was acting only in the capacity as an agent for the Technical Education Department of the State of Uttar Pradesh. Counter Claim No. 1 of RITES in sum of Rs. 9,60,475/- was the alleged loss due to non-utilization of the building for the period of alleged delay. Counter Claim No. 2 was for extra money spent by RITES towards engaging its own staff and overheads during prolonged period of contract and was in sum of Rs. 3,10,530/-. Counter Claim No. 3 was for compensation on account of loss of earning per employee of RITES and Counter Claim No. 4 was for compensation on account of loss of business opportunity.

5. We cannot but help recording that it is a case of comedy of errors resulting in a tragedy in law.

6. It is no doubt true that the Technical Education Department of the State of Uttar Pradesh, as per its agreement, had required RITES to act as a consultant and for which money was paid to RITES. But, RITES was put in charge of the entire project including funds made available to RITES. The Notice Inviting Tender issue by RITES did bring it to the notice of the contractor that the works were to be executed for the benefit of the State of Uttar Pradesh and this is the reason why the letter of award was signed by a person on behalf of the State of Uttar Pradesh. Unfortunately, the counsel for the claimant i.e. the contractor overlooked as aforesaid and filed a claim against RITES, which mutedly took a stand in the reply filed to the statement of claim that the liability if any was that of the principal, but for reasons unknown filed a counter claim, and from the headings of the counter claim briefly noted by us herein above would lead any person to bona-fide belief that the counter claim would be by the owner of the works. We illustrate. How could an agent lay a claim to Counter Claim No. 1 by way of loss due to non-utilization of the building. The very nature of the counter claim would mislead anyone to believe that it is the owner of the work which is responding to the claim and raising a counter claim. Similarly would be the

position with respect to the other three counter claims.

7. Since RITES is responsible for the mess, it must suffer the consequence and must bear the burden of the award. It may seek recompense thereafter from the State of Uttrakhand (as of today).

8. We allow the appeal and set aside the impugned order dated February 05, 2010 and as a consequence dismiss OMP No. 13/2003 filed by RITES Ltd. and hold that as per the award RITES Ltd. has to satisfy the claim.

9. We have something more to speak.

10. The appellant before us i.e. Director, UP Technical Education Department was required to deposit the decretal amounts in this Court as a condition of stay of the award being executed against it and it proceeded to the Supreme Court challenging the order as per SLP(C) No. 7970/2011 raising a grievance that the liability had to be that of State of Uttrakhand. Vide order dated February 25, 2011 the Supreme Court directed that deposit made by the appellant as directed by this Court would be made and State of Uttrakhand may be impleaded as a party and thereafter we find that State of Uttrakhand was impleaded as a party.

11. In view of our decision above we direct that the amount deposited by the appellant would be returned to the appellant by endorsing the FDR in the name of the appellant and this would mean that the interest accrued would be to the benefit of the appellant.

12. Respondent No. 2 would be free to execute the award against RITES Ltd. Parties shall bear their own costs.

