

(2019) 08 CAL CK 0011

In the Calcutta High Court

Case No : Arbitration Petition (AP) No. 109 Of 2019

Harji Engineering Works Private Limited

APPELLANT

Vs

Bridge & Roof Co. (India) Ltd

RESPONDENT

Date of Decision : 05-08-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 34
Specific Relief Act 1963 — Section 26

Citation : (2019) 08 CAL CK 0011

Hon'ble Judges : Arindam Sinha, J

Bench : Single Bench

**Advocate : Suddhasatva Banerjee, Chayan Gupta, Sweta Ganchi Murgai,
Hashnuhana Chakraborty, Debopriyo Nath**

Judgement

Normal suraj 2 1 2019-08-12T05:01:00Z 2019-08-12T05:02:00Z 2 1019
5810 48 13 6816 12.00

Clean false false false false EN-US X-NONE KN
MicrosoftInternetExplorer4

```
/* Style Definitions */ table.MsoNormalTable {mso-style-name:"Table Normal";  
mso-tstyle-rowband-size:0; mso-tstyle-colband-size:0; mso-style-noshow:yes;  
mso-style-priority:99; mso-style-qformat:yes; mso-style-parent:""; mso-  
padding-alt:0in 5.4pt 0in 5.4pt; mso-para-margin:0in; mso-para-margin-  
bottom:.0001pt; mso-pagination:widow-orphan; font-size:10.0pt; font-  
family:"Verdana","serif";}
```

Arindam Sinha, J

The Court : This arbitration petition is for setting aside award.

Mr.Banerjee, learned advocate appears on behalf of petitioner and submits, there was mistake in relevant term of the contract, in respect of price escalation. He demonstrates his client's claim in the reference was regarding this mistake. Inter

alia, material claims made in statement of claim are reproduced below:-

"a) Declaration that the words "last date of submission of tender" would be substituted by the words "billing month under consideration.

(b) Award for a sum of Rs.81.85 Lakhs as pleaded in paragraph 33 hereinabove".

He draws attention to view expressed by the Tribunal with regard to this contention of his client, to reject it. The view is extracted and reproduced below.

"In the background of the aforesaid discussion and after giving due regard to the various decisions, cited by the Id. counsel for the parties, I am of clear view that there is little scope to even attempt to read more than what meets the eyes."

Ms.Charkaborty, learned advocate appears on behalf of respondent, here and in the reference. She submits, the award does not suffer any defect for it to be interfered with under section 34 of Arbitration and Conciliation Act, 1996. Petitioner can only maintain a challenge, which is founded on the award being against public policy. This was an engineering contract. If it was a case of mistake, it would have been detected earlier. The statement of claim does not carry the word 'mistake'. Even then the Tribunal went into the contention and held against claimant as would appear from face of the award. She relies on following extract from the award:-

"Having regard to the factual backdrop of the present case I find it very difficult, if not impossible, to accept the contention as made on behalf of the claimant that there had been any "mutual mistake" on the part of the parties in the agreement under reference."

Mr.Banerjee in reply submits, his client's contention, based on section 26 of Specific Relief Act, 1963, was in fact not gone into. An engineering contract, which has a price escalation clause by a formula, is one that would always yield result zero, has to be inferred as carrying mutual mistake.

Parties have a contract between them containing arbitration clause. Disputes and differences arising or in relation to the contract were referred. A contention under section 26 would also be a contention arising by reason of the contract. Parties agreed that any disputes between them would be referred to arbitration for resolution thereby. It follows that even though section 26 enables parties to institute a suit, the contention to be adjudicated in such suit must necessarily be adjudicated in the reference. Respondent had demonstrated, arbitrator came to a finding on working of the formula as per extract above. Still, Court is inclined to appoint amicus curie, to ascertain petitioner's contention, whether has any basis.

Jadavpur University through its civil engineering department is appointed amicus curie. Registrar, Original Side will serve a copy of this order on the department.

Query of Court for assistance of the department is whether in price variation clause 37 of Special Conditions of Contract, there is a mistake which would result working of it by input of increased prices, in zero ? The clause is set out below:-

Clause No.

Description

37

PRICE VARIATION COMPENSATION

37.1

Applicable for Item No. 1,3 & 10 of Schedule of Quantities

$ACV1 = CV[F + 1L1$

$L0$

$+ mM1$

$M0$

$+ dD1]$

$D0$

37.2

Applicable for all items except Item No. 1, 3 & 10 of Schedule of Quantities

$ACV1 = CV[F + 1L1$

$L0$

$+ eE1$

$E0$

$+ oO1]$

$O0$

$+ aA1 + dD1]$

$A0 \quad D0$

Where:

ACV1 = Adjusted contract price i.e. Value of work done after application of above price adjustment formula.

CV = Base contract price subject to price adjustment i.e. the value of the work done in the given period for which the price adjustment is to be calculated.

F = Fixed component portion of contract price which will not be subject to any adjustment under this formula or otherwise.

= 0.30 for 37.1 and 0.40 for 37.2 above.

L = Labour index, which shall be the "Index Number" of "Consumer Price Index

for industrial workers: (All India)" as published by Labour Bureau, Simla, in their monthly bulletin titled

"Indian Labour Journal.

M = Material Index, which will be the "Index Number" of "whole-sale prices index" under

Group "All Commodities" as published by Ministry of Industry in their monthly bulletin entitled "Index number of wholesale prices".

D = High Speed Diesel Price per litre, which will be the price of High Speed Diesel Oil at the

Indian Oil Corpn. retail outlet nearest to the project (selling price inclusive of taxes and duties, if any, per litre of high speed diesel oil.)

O = Wholesale Price Index of "Oxygen" as published by Office of Economic Advisor.

A = Wholesale Price Index of "Other Organic Chemicals" as published by Office of Economic

Advisor.

E = Whole sale price index of "Welding Rods" as published by Office of Economic Advisor.

I = Labour component of the Contract Price which will be subject to adjustment.

= 0.27 for 37.1, 0.25 for 37.2 above.

m = Material component of the contract price (excluding Owner Issue Materials) Which will be subject to adjustment.

= 0.38 for 37.1 above.

d = High Speed Diesel/P.O.L component of the contract price which will be subject to adjustment.

= 0.05 for 37.1 & 37.2 above.

e = Electrode Component of the Contract Price which will be subject to adjustment

= 0.15 for 37.2 above.

o = Oxygen Gas Component of the contract price which will be subject to adjustment

= 0.05 for 37.2 above.

a = Acetylene Gas Component Gas of the contract price which will be subject to adjustment.

= 0.10 for 37.2 above.

SUBSCRIPT

0 = Refers to the values of the above mentioned labour/material/Gas indices or diesel prices, as on the last date of submission of Tender.

1 = Refers to the values of the corresponding labour/materials/Gas indices or diesel prices, as applicable, for the last date of submission of Tender for which adjustment is applicable

(respectively).

The University might convey its answer, by way of assistance, to Registrar, Original Side of this Court.

Ms.Chakraborty, learned advocate, without prejudice to her client's contention, submits, amicus curie should be given the entire contract, without benefit of which the query may possibly not be or satisfactorily answered. Amicus curie is on notice of this submission. If the department requires the entire contract, it will say so.

List on 21st August, 2019 under heading "For Orders".