(2010) 03 DEL CK 0038

In the Delhi High Court

Case No : OMP No. 613 of 2009

National Highways Authority of India — APPELLANT

Vs

OSE-GIL J.V. — RESPONDENT

Date of Decision : 11-03-2010

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2010) 03 DEL CK 0038

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Padma Priya, for the Appellant; Anil Airi, for the Respondent

Judgement

Valmiki J Mehta, J.

I.A. No. 13378/09(Condonation of delay) in O.M.P. No. 613/09

For the reasons stated in the application, the delay in refilling of four days is condoned.

I.A. stands disposed of.

O.M.P. No. 613/09

1. By this petition u/s 34 of the Arbitration and Conciliation Act, 1996, the petitioner challenges the Award passed by the Arbitration Tribunal dated 18.4.2009, and as per which Award, the Arbitration Tribunal has allowed the claim of the respondent herein for escalation in the price of boulders under Clause 70.8 of the contract treating the same to be an entitlement based on subsequent legislation.

2. The counsel for the petitioner urged that the issue is fully covered against the respondent and has brought to my attention decision of a Learned Single Judge of this Court (Rajiv Sahai Endlaw, J.) in the case of Larsen and Toubro Limited v. National Highways Authority of India in O.M.P. No. 514/2009 decided on

9.9.2009. An identical issue has been decided by this Court in the aforesaid case of Larsen and Toubro (supra) by holding that when there is an increased payment of royalty for boulders, then, the same cannot be treated as subsequent legislation under Clause 70.8 inasmuch as the contractor already gets benefit of escalation under other clauses of the contract, which clauses provide for and cover the entitlement of the contractor for escalation in price of materials including boulders. In the present case, the relevant clauses are Clause 70.1, 70.3 and 70.3(vii). Since, interpretation of identical clauses have been decided in the aforesaid decision in Larsen and Toubro''s case, I am bound by the same. In fact, I am in respectful agreement, with the views of the Learned Single Judge of this Court in Larsen & Toubro''s case which are contained in paras 11 to 14 & 20 of the said judgment and which read as under:

11. Any other interpretation would be anomalous. Clause 70.3B aforesaid is with respect to "all materials" used in the contract and not only those materials included in the basket of 58 commodities determining WPI. As per the formula provided therein, the petitioner/contractors will get variation in price of all materials irrespective of whether the price of materials used in contract have varied or not, as long as WPI has varied. In a given case say of increase in prices, it is possible that WPI has gone up owing to increase in prices of 58 commodities included in basket determining the same, but there is no increase in prices of material used in the works under the contract, say boulders and ordinary sand. The petitioner will thus benefit from increase in WPI, though has not suffered any increase in costs. A reading of the formula given in Clause 70.3B does not have any doubt as to the same. Can then it be said that if there is increase in price of boulders and ordinary sand, but WPI has not varied, the petitioner would be still entitled to increase, this time under Clause 70.8 because increase is on account of subsequent legislation. The answer has to be No.

12. It is further the admitted position that had the increase in royalty been with respect to any of the minerals included in the basket of 58 commodities determining the WPI, the impact thereof would be visible on the WPI. The question which arises is, whether WPI is to be confined to the 58 items in the basket determining the same only or generally for determination of variation in price of all materials. Not only does the contract in the present case makes it the index of variation in price of all materials but WPI by its very nature is representative. It tracks the movement of price of each (articles on google say it includes 435 commodities in its basket and not 58 as mentioned in the award) commodity individually and based on this individual movement, WPI is determined through averaging principle. It captures the price movement.

13. The parties in the present case have agreed to variation in prices of all materials as per WPI, the petitioner cannot be heard that variation in price of boulders and ordinary sand on account of subsequent legislation is not covered by Clause 70.3B (supra) merely for the reason of boulders and ordinary sand being not included in the basket determining WPI. Clause 70.8, not only in the

non obstante part towards its end, but also by use of words "other than under the proceeding sub-clauses of this clause" excludes increase in cost of materials, even on account of subsequent legislation from the purview of Clause 70.8. Clause 70.2 expressly provides that even if the petitioner is not fully compensated for increase in cost on account of increase in royalty of boulders and ordinary sand, for the reason of such increase being not reflected in WPI, such increase shall be deemed to be included in the prices thereof stipulated in the contract.

14. There is yet another reason for me to hold so. Even if suppose such increase in royalty were to be reflected in the WPI directly if boulders and ordinary sand were included in the basket of commodities determining WPI; the increase would not be of the entire enhancement. Could in such a situation, the petitioner be heard to say that the balance increase should be given under Clause 70.8. The answer against has to be No. Once the variation is covered by formula provided for variation of price of labour, material, petroleum, oil lubricants, plant, equipment, foreign inputs, the variation with respect thereto, even if on account of subsequent legislation cannot be covered by Clause 70.8. Else, it will amount to variation under two clauses and which is not permitted.

20. The counsel for the petitioner has also urged that if the interpretation adopted by the Arbitral Tribunal is to be accepted, the same will result in the clause becoming otiose. I do not agree with the said contention also. All that the Arbitral Tribunal has held is that the increase under Clause 70.8 is not for increase in cost of materials, provision wherefor has been made in accordance with the preceding sub-clauses of Clause 70.

3. In view of the above that the present issue is a covered matter, I do not find that there is any argument by the respondent which can be accepted by this Court as the issue is completely covered by the aforesaid judgment of Larsen and Toubro''s case. The counsel for the respondent sought to differentiate the judgment of Larsen and Toubro''s case on facts and also by stating that other clauses of the present contract entitle the respondent to increase in the price of royalty for boulders. I do not agree. In my opinion, the aforesaid judgment fully covers the issue in favour of the petitioner in the present case.

4. In view of the above, I accept the objections to the Award and the impugned Award dated 18.4.2009 is set aside. It is held that respondent is not entitled to increased price of boulders which is caused on account of increase in royalty, inasmuch as escalation on materials including boulders is otherwise provided for and paid to the respondent/contractor under other clauses of the contract, and hence cannot be granted under Clause 70.8.

5. With the aforesaid observations, the present petition stands disposed of, leaving the parties to bear their own costs.

