

(2010) 03 DEL CK 0158
In the Delhi High Court
Case No : O.M.P. No. 484 of 2009

Simplex Infrastructures Ltd.		APPELLANT
	Vs	
National Highways Authority of India		RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Arbitration Act, 1940 — Section 41
Arbitration and Conciliation Act, 1996 — Section 36, 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 35
Specific Relief Act, 1963 — Section 41

Citation : (2010) 03 DEL CK 0158

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Sujoy Kumar, K.V.Singh and Manish Dembla, for the Appellant;
Sandeep Sethi Padma Priya and Meenakshi Sood, for the Respondent

Judgement

Valmiki J Mehta, J.—This is a petition u/s 9 of the Arbitration and Conciliation Act, 1996 whereby the petitioner seeks the following relief:

(i) pass an ad-interim ex parte order restraining the Respondent from implementing and/or enforcing or otherwise giving effect to its letter Nos. NHAI/40020/Tech-III/EW-III/2006/WB-4/735 and NHAI/PIU/Araria/escalation/2009 dated July 20, 2009 and July 29, 2009 respectively, Annexures P-1 and P-2 to the petition, and further restraining the Respondent from deducting any amounts from the payments due to the petitioner or otherwise recovering any payments in pursuance of the said letters until the eventual resolution of the dispute between the Petitioner and the Respondent.

2. Irrespective of the wording of the prayer clause, in effect, the relief which is being sought by the petitioner is that the interpretation of a Contractual Clause as given by the petitioner, and as was adopted earlier till modified, be accepted and payment be directed to be made by the respondent to the petitioner in terms of the original interpretation given to Clause 70.3 by the respondent and the

Engineer of the project i.e. the relief claimed is for mandatory injunction for payment, akin to execution of a money decree.

3. The facts of the case are that a contract was entered into between the petitioner and the respondent whereby the petitioner was granted the work of widening and strengthening of 4-lane of existing single/intermediate lane carriageway of National Highway No. 57 section from Km.159.357 to 174.383 (Simrahi Kosi Eastern Bund Section) in the State of Bihar on East West Corridor under NHDP Phase-II Project, Package No. "C-II/BR-4".

4. There is a Clause 70.3 in the Contract, the relevant portion of which reads as under:

Contract Price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures as per formula given below. The amount certified in each payment certificate is adjusted by applying the respective price adjustment factor to the payment amounts due.

(a) Price adjustment shall apply only for work carried out within the stipulated time or extensions granted by the Employer and shall not apply to work carried out beyond the stipulated times price adjustment for extensions for reasons attributable to the Contractor, shall be paid in accordance with Sub-clause 70.5.

Price adjustment shall be calculated as per the formula given below-

Note For the application of this Clause, index of heavy machinery and parts has been chosen to represent the Plant and Machinery spares component.

(v) Adjustment for Bitumen Component

Price adjustment for increase or decrease in the cost of bitumen shall be paid in accordance with the following formula:

$$V_b = 0.85 \times P_b / 100 \times R_x (B_1 - B_0) / B_0$$

V_b = increase or decrease in the cost of work during the month 31 NHA under the consideration due to changes in the rates for bitumen.

B_0 = the average official retail price of bitumen at the nearest refinery for the place as defined in Appendix to Bid, in the previous month prior to the date of submission of bids.

B_1 = the average official retail price of bitumen at nearest refinery for the place as defined in Appendix to Bid, in the previous month prior to the last day of the period to which a particular interim Payment Certificate is related.

P_b = Percentage of bitumen component of the work.

(viii) The following percentages will govern the price adjustment of the contract:

1. Labour-P1 20% 2. Plant and Machinery and Spares-Pp 20% 3. POL-Pf 10% 4.

Bitumen-Pb x% 5. Cement-Pc y% 6. Steel-Ps z% 7. Other materials-Pm 50-(x + y + z)% % 100 (Note: x, y, z are the actual cost of bitumen, cement and steel respectively used for execution of work as per the Interim Payment Certificate for the month.)

5. The disputes between the parties centres around the interpretation of this Clause. There are two conflicting interpretations placed by either parties upon this Clause. Whereas the petitioner contends that its interpretation is correct and the expression "actual cost" appearing in Clause 70.3 (viii) means the actual cost of cement, steel and bitumen, the interpretation of the respondent is that the ingredients "x, y and z" refer only to the percentages and not the actual cost.

6. The contract in question contains a dispute resolution mechanism in terms of Clauses 67.1 and 67.3 and which I need not reproduce herein but suffice to say that if there are disputes between the parties arising out of and related in any manner with the contract, then, first the disputes are referred to the Disputes Review Board and on a party being dissatisfied with the decision of the Disputes Review Board, arbitration proceedings can be initiated. It is thereafter, that the Arbitration Award, which will become final, will bind the parties. Before I proceed further, with the discussion in the present case, one thing which is absolutely clear is that, this Court is hearing arguments in a petition u/s 9 of the Arbitration and Conciliation Act, 1996 to which the principles which would govern are the principles of Order 39 Rules 1 and 2 CPC, 1908 and the arbitration proceedings are yet to commence and an executable Award is still to come into existence. Also would be applicable for the disposal of the present petition the provisions of the Specific Relief Act, 1963 which govern the grant of injunction pendente lite or permanent or mandatory.

7. As I have already stated, the relief clause in the present case effectively seeks a mandatory injunction seeking directions to the respondent to pay to the petitioner and continue to pay to the petitioner amounts as per the petitioner's interpretation of the Clause 70.3 of the Contract. The relief prayed is in effect therefore in the nature of an execution of a decree/Award in which there is a finding that the interpretation of the petitioner is correct. However, the fact of the matter is that parties are at serious loggerheads with regard to the interpretation of Clause 70.3. Proceedings are going on before the Dispute Review Board and thereafter arbitration proceedings have still to take place. It is only when the Arbitration Award is passed, will one know, whether the interpretation of Clause 70.3 of the petitioner or the respondent is correct. I would definitely not want to venture into the aspect of which interpretation on merits is correct, because, as on date, the limited issue is that whether by an interim order, direction can be passed for asking the respondent to make payment to the petitioner although a final executable Award accepting the interpretation of Clause 70.3 as urged by the petitioner does not exist.

8. The learned Counsel for the petitioner has very strenuously relied upon the decision of the Supreme Court reported as Transmission Corporation of A.P. Ltd.

and Others Vs. Lanco Kondapalli Power Pvt. Ltd., . On the basis of paragraphs 48, 49 and 57 of this judgment, the counsel for the petitioner contended that once an interpretation is given of a particular clause in contract, which has been accepted for a sufficient period of time, and which in the facts of this case is for a substantial number of 32 Interim Payments Certificates, then such an interpretation of the clause must continue to govern in future and by means of a prayer u/s 9, the respondent can be asked to make the payments in terms of the original interpretation of Clause 70.3. I may note that the decision of the Supreme Court in the case of Transmission Corporation (Supra) is of a Bench of two Judges. In the said judgment, the Supreme Court does not discuss the issue as to whether an injunction can be granted during the pendency of determination of disputes by an appropriate forum the effect of which is that the petitioner can get payment and continue to get payment, effectively as if to say by execution of money decree by passing an order of mandatory injunction u/s 9.

9. The Supreme Court, in the case of Union of India (UOI) Vs. Raman Iron Foundry, (a bench of two judges) passed an interim injunction, u/s 41 of the erstwhile Arbitration Act, 1940, the effect of which was that the respondent therein was in effect directed to make payment to the petitioner. This legal position as laid down in this judgment of the Supreme Court was specifically overruled by a three Judge Bench of the Supreme Court in the case reported as H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, . The Supreme Court specifically overruling the ratio of Raman Iron Foundry (supra) has held that no injunction can be granted the effect of which is to direct payment to the petitioner. The decision of H.M. Kamaluddin Ansari's case has been also followed by the Supreme Court in M/s. Sant Ram and Company Vs. State of Rajasthan and others, . The following paragraph of the judgment in H.M. Kamaluddin Ansari is relevant and reproduced below.

We are clearly of the view that an injunction order restraining respondents from withholding the amount due under other pending bills to the contractor virtually amounts to a direction to pay amount to the contractor-appellants. Such an order was clearly beyond the purview of Clause (b) of Section 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. But certainly Clause 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount.

10. It is therefore quite clear that no injunction can be granted the effect of which is a mandatory injunction directing payment. I may refer to Section 41(h) of the Specific Relief Act which states that no injunction can be granted where an equal efficacious relief can be obtained by the petitioner. When effectively what is sought is a money decree, then, by virtue of Section 41(h), no interim injunction can be granted because the petitioner has to seek and succeed in getting a

money decree/award for its claims. In my opinion, grant of an injunction as prayed for by the petitioner would be wholly and completely misconceived because the effect of the injunction order would be that the petitioner's interpretation as on date should necessarily be taken as correct, although, substantive proceedings to determine the same in arbitration have yet to take place. The further effect of the injunction would be that although no substantive proceedings have started the petitioner's presumption is to be given effect that there is an executable Award in its favour accepting its interpretation of Clause 70.3 viz the effect is that the Award has become final by dismissal of the objections to the Award and there is to take place enforcement and execution of the Award u/s 36 of the Act. In my opinion, the present is a classic case of putting the cart before the horse. Surely, the horse is to precede the cart i.e. an Award giving the benefit of money decree must necessarily precede the cart of any legal proceedings seeking benefit of an executable Award.

Another aspect which is necessary to mention is that the right to withhold amounts is independent of a Contractual Clause entitling the same i.e. a withholding can take place under a common law right although there is no Contractual Clause entitling the withholding. In view of the above discussion, it is also not possible to accept the argument of the counsel for the petitioner that the case of M.H. Kamaluddin Ansari is distinguishable on facts, because the clear ratio and mandate of that judgment is that by an injunction payment cannot be ordered to be made to a person.

11. I am bound by a three bench judgment of the Supreme Court in H.M. Kamaluddin Ansari's case because it is settled law that the decision in H.M. Kamaluddin Ansari's case being of a three Judge bench will prevail over the decision of two Judge Bench in the case of Transmission Corporation This is the law by virtue of Constitution Bench Judgment of the Supreme Court reported as Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., .

12. In view of the above, I do not find any prima facie case in favour of the petitioner. The petitioner will not be caused any irreparable injury which cannot be compensated in terms of the money.

13. In view of the above, the present petition is dismissed with costs of Rs. 50,000/- in terms of para 37 of the judgment of the Supreme Court in the case of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), and by which judgment the Supreme Court has said that it is high time that actual compensatory costs should now be imposed with respect to the legal proceedings. I may also note that in terms of Section 35 of CPC 1908, costs have to follow the event. Since petition is being dismissed, costs in favour of the respondent and against the petitioner are awarded. For the satisfaction of the counsel for the petitioner I note that nothing herein will tantamount to any expression of opinion on merits or interpretation of any of the Clauses of the Contract, including Clause 70.3, although I have not given interpretation of any Clause of the Contract. The petition stands disposed of.