
(2012) 03 DEL CK 0213
In the Delhi High Court
Case No : CS (OS) 784 of 2006

S.S. Kapoor

APPELLANT

Vs

National Building Construction Corporation Ltd.

RESPONDENT

Date of Decision : 21-03-2012

Acts Referred:

Arbitration Act, 1940 — Section 20, 20(4), 30, 33

Citation : (2012) 03 DEL CK 0213

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : K. Sunil, for the Appellant; Poonam, for the Respondent

Judgement

Justice S. Muralidhar

1. By this common judgment the objections filed by National Building Construction Corporation Limited ("NBCC") as well as S.S. Kapoor, Sole Proprietor of M/s. Jit Electricals under Sections 30 and 33 of the Arbitration Act, 1940 ("Act") against the Award dated 1st April 2006 passed by the learned Sole Arbitrator are being disposed of.

2. The impugned Award was passed in the disputes between the parties arising out of the contract for the work of external electrification on labour rate basis at Baniwalid, Libya that was awarded by NBCC to M/s. Jit Electricals for the value of Libyan Dinar (LD) 154,953.600 and for which an agreement was signed on 22nd June 1981.

3. The Notice Inviting Tender ("NIT"), the Letter of Intent ("LOI"), letters of Jit Electricals dated 18th August 1980 and 6th November 1980, the Acceptance Letter as well as the Agreement formed part of the contract between the parties. In terms of para 13 of the LOI, the contract was made subject to all conditions applicable to the contract between NBCC and the Libyan authorities for the construction of their utility services. Under para 11 of the Quotation Notice, all the payments were to be made in the Libyan Currency and NBCC was to assist

the contractor in transferring abroad such amount in foreign currency as admissible under Libyan Exchange Control Regulations and also as per contractual conditions between the NBCC and the Libyan authorities.

4. With disputes arising between the parties, M/s. Jit Electricals invoked the arbitration Clause 10 of the General Terms and Conditions ("GCC") of the contract. NBCC was called upon to appoint an Arbitrator. The letter dated 3rd February 1990 was sent by M/s. Jit Electricals to NBCC in this regard. Upon failure of NBCC to appoint an Arbitrator M/s. Jit Electricals filed a petition u/s 20(4) of the Act in this Court. Initially this Court appointed Mr. Justice M.L. Jain (Retired) as an Arbitrator. The NBCC had, on 14th December 1990, belatedly nominated Mr. G.S. Rao, General Manager of NBCC as an Arbitrator. Since the matter was pending before the Court, the said Arbitrator did not commence the proceedings. The NBCC then moved an application before this Court for setting aside the order by which Mr. Justice M.L. Jain was appointed as an Arbitrator. The Court allowed the application and set aside its order while giving directions to NBCC to nominate an Arbitrator in terms of the arbitration clause within six weeks. M/s. Jit Electricals filed an appeal FAO (OS) No. 55 of 1999 against the said order. The Division Bench allowed the appeal and appointed Mr. Justice P.K. Bahri (retired) as sole Arbitrator.

5. The facts in brief are that the Public Housing Corporation of Libya awarded a contract to the NBCC for construction of 1000 housing units with necessary public utility services at Baniwalid, Libya by a contract dated 7th April 1979. The contract was for providing the utility services including the works of electricity and public lighting network at the sites in Annexures A and B and 23 other sites in the valley of Baniwalid. This was a back-to-back contract wherein the contractor would be responsible for the complete execution of the electrical work on labour rate basis and would be responsible for paying all charges, stamp duty and taxes payable under the laws of Libya. The Contractor was to comply with all the Libyan laws and it was to be on labour rate basis in Libyan Dinar (LD) as per rates quoted without any liability on the NBCC on account of exchange rate fluctuations. Also the tenderers were put on notice to visit the sites in Libya at their own costs and to study the working conditions at the site before submitting the bid and without any obligation on the NBCC to award the work. The work was to be completed within six months from the date of issue of the LOI in phases.

6. NBCC issued the letter dated 17th January 1981 awarding the contract to M/s. Jit Electricals requiring it to mobilize its work force within 45 days and complete the work within six months from the date of issue of LOI. The value of the work was estimated to be LD 154,953.600 with variations plus or minus 25%. A formal agreement came to be executed on 22nd June 1981.

7. According to M/s. Jit Electricals, it was able to mobilize its work force only in July 1981 and the work site was handed over to it by NBCC only on 15th July 1981. NBCC stipulated that the work was awarded to Jit Electricals as piece rate worker ("PRW"). Clause 20 of the Financial Terms and Conditions ("FTC")

forming part of the contract entered into by the NBCC with the Housing Public Corporation, Libya, was applicable to PRW as well.

8. The learned Arbitrator, in the impugned Award dated 1st April 2006, held that NBCC was required to pay M/s. Jit Electricals US Dollars 46377 to be converted into Indian Currency at the exchange rate as on 31st March 2006. Claim No. 1 under which the PRW had claimed LD 1333.502 being the undisputed amount of the revised final bill (Ex. C-22) was allowed. Claim No. 4 was under six heads. As regards claim towards amounts wrongfully recovered for providing temporary labour accommodation to the PRW, the learned Arbitrator awarded LD 3596.615. Under Claim No. 4 (B), the learned Arbitrator allowed the claim for refund of LD 1448.145 being the amount of security/retention money which was to be released by the NBCC. Claim No. 4 (C) was allowed to the extent of LD 448.840 being the amount of excess taxes recovered from the PRW.

9. To the above extent NBCC has in O.M.P. No. 191 of 2006 filed objections. M/s. Jit Electricals has filed objections in CS (OS) no. 784 of 2006 to the extent that some of its claims [other than Claim Nos. 1, 4 (A), 4(B) and 4 (C)] have been rejected.

10. this Court has heard the submissions of Mr. K. Sunil, Learned Counsel for S.S. Kapoor and Ms. Poonam, Learned Counsel for NBCC. Written submissions have also been filed by the NBCC.

11. A preliminary submission of the NBCC is that the petition u/s 20 of the Act could not have been filed by S.S. Kapoor in his capacity as a Sole Proprietor of Jit Electricals since it was the concern and not Mr. S.S. Kapoor who was party to the arbitral proceedings. Reliance is placed by Learned Counsel for the NBCC on the decision in Bhagvan Manaji Marwadi Vs. Hiraji Premaji Marwadi,

12. There is no merit in the above objection. A proprietary concern is required to be represented by its proprietor. It is in his capacity as proprietor that Mr. S.S. Kapoor has filed the petition u/s 20 of the Act as well as the present objections. The decision in Bhagvan Manaji Marwadi v. Hiraji Premaji Marwadi relied upon by the NBCC is distinguishable on facts. There an award was made against a firm and thereafter the three partners against whom the decree was sought to be executed brought to a suit for declaration that the decree was not binding on them. The objection was that the suit could not be brought in the name of the firm by only one of the partners. Upholding the said objection it was observed that "one man cannot constitute a firm". In the present case, it is the proprietary concern that was a party and not a firm. It could be and had to be represented by its proprietor who has in fact filed the present petition and objections as well.

13. As regards the claims, the first objection of the NBCC is that all payments in terms of Item 11 of the quotation notice had to be made in LD. It is pointed out that quotations were submitted only in LD by the claimant. Item 20 of the quotation notice provided that the agreement would be on labour rate basis. Under Clause 9 of the GCC, all amounts due to the PRW under the contract were

to be paid in LD. NBCC was to assist the PRW for transferring abroad 60% of the contract value in foreign currency.

14. In paras 32 and 33 of the impugned Award, the learned Arbitrator has considered the above objection and held as under:

32. The claimant has urged that the LD amount be converted to US dollars at the exchange rate prevalent at the time the payment became due. The Learned Counsel for the Respondent on the other hand has contended that in terms of the contract, the payment was to be made only in LD and the amount, if any, to be awarded should be in LD convertible into Indian currency as on the date of the Award.

33. Clause 11 of the contract stipulated payment in Libyan currency but it also provided that the Respondent shall assist the contractor in transferring abroad such amount in foreign currency as admissible under Libyan Exchange Control Regulations. In case the payment has been made in March 1987, the claimant could seek transferring the amount in US dollars at that time. Hence, I hold that the amount would be converted to US Dollars at the prevalent foreign exchange rate as on 1st March 1987.

15. The claimant could not have transferred the amount out of Libya without the permission of the NBCC. Indeed if ultimately the payment was ordered to be made to the claimant in Indian rupees, and in terms of the contract NBCC was to assist the claimant in securing the payment by converting the LD into Indian rupees, the direction of the learned Arbitrator in that regard cannot be held to be contrary to the contractual provisions. Moreover Clause 9 of the GCC and 11 of the Quotation Notice contemplates a situation where the payment would have been made contemporaneously with the work done and not where the claim is being settled after several years after completion of project. The objection in this regard is therefore, rejected.

16. Claim No. 1 was in relation to the revised final bill. The learned Arbitrator awarded the Petitioner LD 1333.500. Under Claim No. 1 (a) the learned Arbitrator awarded 5% per annum pendente lite interest and 9% per annum post-award interest. The learned Arbitrator has given cogent reasons for the decision after discussing the evidence in detail. The objections of the NBCC are an invitation to re-appreciate the evidence which this Court is not inclined to do. The Award in respect of Claim Nos. 1 and 1 (a) is upheld.

17. Claim Nos. 4 and 4 (A) were for refund of amounts wrongfully recovered on account of providing temporary labour accommodation to the claimant. Again after discussing the evidence placed on record it was held that NBCC was entitled to charge the rate mentioned in Clause 6 of the GCC relating to new construction only. The documents showed that NBCC was only entitled to LD 403.385 whereas it had deducted LD 4000. Consequently, the NBCC was asked to refund against Claim Nos. 4 and 4 (A) LD 3596.615 to the claimant. The interpretation placed by the learned Arbitrator on Clause 6 to the effect that it only envisages new

constructed accommodation is a plausible view to take. It cannot be said to be an error on the face of the Award.

18. Claim 4 (B) was for refund of the security/retention money. The learned Arbitrator noticed that in the statement of defence the NBCC had not offered any explanation for not releasing the retention money. Even in the written note of submissions no satisfactory explanation was offered by the NBCC in this regard. The Award in this regard cannot be said to be erroneous and this objection is also rejected.

19. Claim No. 4(C) concerned excess recovery of taxes. The NBCC refers to a letter dated 3rd October 1983 whereby the Libyan Authorities had directed that tax had to be deducted @ 10% up to 31st December 1982 and 7% up to 1st January 1983. The learned Arbitrator had, in discussing the claim, referred to a letter dated 14th May 1985 whereby the NBCC admitted that LD 2159.760 had been withheld for depositing taxes with Libyan Authorities. This was followed by another letter dated 22nd January 1987 whereby NBCC assured the petitioner that the excess amount of taxes recovered would be refunded to the Petitioner. The claimant was able to demonstrate before the learned Arbitrator that Libyan Authorities in fact required NBCC to release the balance amount after deducting LD 1814.32 as taxes. It was on this basis that the claimant sought refund of LD 748.740. It was noticed by the learned Arbitrator that "in the statement of defence these facts have not been at all controverted." In that view of the matter, the decision of the learned Arbitrator as regards Claim No. 4 (C) can also not be faulted.

20. this Court does not find any ground having been made out by the NBCC to challenge the impugned Award to the extent that the above claims of the claimant have been allowed.

21. The objections filed by the claimant (Petitioner S.S. Kapoor) in CS (OS) 784 of 2006 as regards the rejection of Claims 2, 3, 4 (F), 5, 6, 7, 8, 9, 10 and 11, are taken up next.

22. Claim No. 2 was for the work done but not included in the final bill. The learned Arbitrator analyzed the clauses of the contract and examined the final bill (C-22) in which while accepting the measurements the claimant recorded its protest. However, the claimant did not make NBCC aware of any reasons of such protest. The learned Arbitrator held that the claimant was entitled to payment of the second final bill on the basis of the measurements recorded and accepted by the Libyan Authorities. In the circumstances, it was held that Item Nos. 1 to 10 of Claim No. 2 were not admissible. Item No. 11 was for shifting the material from the central store of the NBCC to the actual sites. It was held that since the claimant was aware of the sites at which the work was to be performed and did not quote any amount in its offer as transportation charges, the claim was not admissible. As regards Item No. 12 towards excessive hire charges for hiring trench excavator along with an operator, a reference was made to Clause 6 of the

notice inviting offer which made it clear that "No tools, plant and machinery for the work shall be issued by the corporation and the same have to be arranged by the contractor at his own costs." Further, Clause 9 of the GCC made it evident that there was no obligation on the part of the NBCC to make available any plant and machinery to the claimant on hire basis. Consequently, the hire charges paid by the claimant to the source from which it was hired could not be recovered from the NBCC. The corresponding claim for the interest on the said amount was also rejected. The Court is unable to discern any illegality in the decision with regard to Claim No. 2.

23. Claim No. 3 was for excavation in ordinary rocks in the sum of LD 7598.596 under three items. It was held that the payment made in the 9th and 10th running bills was at tentative rates which were not mutually agreed rates. The learned Arbitrator found that the Petitioner was unable to substantiate the above claim. The objection in this regard involves re-appreciation of the evidence which this Court is not inclined to do. Claim Nos. 3 and 3 (a) concerned interest on the said amount and were therefore rightly rejected.

24. Claim No. 4 (F) was for wrongful recovery of stamp duty charges. Clause 7 of the FTC stipulated that the PRW had to bear all taxes under the Libyan laws. Stamp duty also formed part of this. The view taken by the learned Arbitrator is a plausible one and does not call for interference.

25. Claim No. 5 was for interest for the period of delay in releasing payment of running bills. The learned Arbitrator held that in a back-to-back contract the claimant was to receive money for the running bills only after NBCC had received the amount for the work done from the Libyan authorities. In fact NBCC started releasing 50% of the amount of the bills even prior the Libyan Authorities releasing the payments for such work to the NBCC. The learned Arbitrator rejected the claim. The Court does not find any illegality in the impugned Award as regards the rejection of Claim No. 5.

26. Claim Nos. 6 and 6 (a) were for escalation amount due to non-payment of interim bills. The learned Arbitrator referred to Clause 6 of the letter inviting tenders and Clause 4 of the FTC which make it clear that other than the rates and amount mentioned in the bill of quantities (BOQ), the claimant would have no right to claim any increase in the agreed contract rates because of increase in the cost of living or increase in oil or any other increase whatsoever. The learned Arbitrator rightly concluded that the parties were bound by the contractual terms and conditions and accordingly, rejected this claim. The Award on this score cannot be faulted.

27. Claim Nos. 7 and 7 (a) were on account of area allowance. On the parity of reasons, the learned Arbitrator rejected the said claims. this Court also affirms this part of the Award for the same reason.

28. Claim No. 8 was for losses suffered due to delay in completion of the contract. Although the stipulated date of completion was 14th January 1982, the

contract was completed in November 1983. It was found that even till 1987 the claimant did not raise any such claim. Even the maintenance period was over in February 1985. The learned Arbitrator rightly concluded that this claim is an after-thought particularly since the last site was handed over on 20th February 1984 itself. There was no evidence placed on record to substantiate this claim. The rejection of the said claim is upheld.

29. Claim No. 9 was for expenses incurred for the salary of the staff and workers and other expenses incurred for the staff/workers from 20th February 1985 to 30th April 1987. No evidence was produced by the claimant to prove that it was unable to repatriate the workers even after the completion of the contract. Clause 11 of the FTC makes it clear that NBCC would not bear any expenses on the importation of the workers in Libya and for their repatriation to India. Rejection of Claim No. 9 is therefore upheld.

30. Claim No. 10 was for pendente-lite and future interest and Claim No. 11 was for cost of the arbitration and litigation. In view of the fact the impugned Award is upheld, the award as far as these claims is also affirmed.

31. The net result is that no grounds have been made out either by the claimant/Petitioner or by the NBCC for setting aside the impugned Award to the extent it is adverse to each of them. The objections by both parties are therefore rejected. The impugned Award is affirmed and made a rule of the Court. Decree sheet be drawn up accordingly.

32. O.M.P. No. 191 of 2006, I.A. No. 779 of 2009 and C.S. (OS) No. 784 of 2006 are disposed of accordingly.