

(2009) 10 DEL CK 0128

In the Delhi High Court

Case No : FAO (OS) No. 27 of 2007 and CM No. 1244 of 2007

Union of India (UOI)

APPELLANT

Vs

TRG Industries Pvt. Ltd.

RESPONDENT

Date of Decision : 27-10-2009

Acts Referred:

Citation : (2009) 10 DEL CK 0128

Hon'ble Judges : Reva Khetrapal, J; Mukul Mudgal, J

Bench : Division Bench

Advocate : Geetanjali Mohan, for the Appellant; Vivekanand, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—This appeal challenges the judgment of the learned Single Judge dated 28th July, 2006 in so far as it relates to the upholding of the Claims No. 1, 2, 3, 5 and 7 by the Arbitrator by his award dated 4th March, 2002.

2. The facts of the case are as follows:

The respondent-TRG Industries (P) Ltd. was awarded a contract regarding "Balance work of design and construction of single track B.G. Railway Project across river Sardan in connection with the construction of Jammu Tawi-Udhampur Rail Link including construction of foundation, substructures, superstructures and various protection works between Km.13.220 and Km.13.900 on Jammu-Udhampur Rail Link Project" by the Northern Railways (appellant herein). Disputes and differences arose between the parties in execution of the contract and the matter was referred to arbitration as per the arbitration Clause in the contract. The following claims were raised by the respondent before the Arbitrator:

Claim No. 1: Waiver of interest charges on mobilization advance recovered by the department for the period of suspension of work.

Claim No. 2: Idle charges for labour and staff for the suspension period.

Claim No. 3: Idle charges for machinery brought to site including depreciation.

Claim No. 4: Loss of mandated output and consequent expenditure on overheads (output of Rs. 13.50 crores was mandated as per Contract over a 24 months period i.e. Rs. 56.25 lacs per month) @ 25% for 3 months 14 days on account of disruption of work.

Claim No. 5: PRCC filling in viaduct portion.

Claim No. 6: Drilling and soiling investigation work.

Claim No. 7: Interest @ 24% from due date of payment to actual date of payment.

3. The Arbitral Tribunal after hearing the parties passed the award on 4th March, 2002 allowed the claims of the respondent to the extent of Rs. 29,59,543/- along with interest @ 24% per annum from due date of payment to actual payment i.e. Rs. 17,75628/-.

4. Aggrieved by the aforesaid award the appellant-Union of India preferred an appeal before the learned Single Judge. The main submission before the learned Single Judge and indeed before this Court in appeal has been that the claims No. 1,2,3,5 and 7 could not be considered by the Arbitral Tribunal as they were "excepted matters". Reliance was placed on Clause 63 of the General Conditions of Contract (in short the "GCC") which reads as follows:

Matters finally determined by the Railway-All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the Railway and the Railway shall within a reasonable time after receipt of the Contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in Clause 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1)(XII)(B)(e)(b) of the General Conditions of Contract or in any Clause of the special conditions of the contract shall be deemed as excepted matters and decisions thereon shall be final and binding on the contractor provided further that excepted matters shall stand specifically excluded from the purview of the arbitration Clause and not be referred to arbitration.

5. Reliance was also placed on Clauses 36(1)(c), 17(3) of the GCC and Clauses 17(3) and 21.5 of the Special Conditions of Contract (in short the "SCC") which read as under:

Clause No. 36(1)(c) of GCC:

Necessary for the safety of the works or any part thereof, the contractor shall not be entitled to the extra costs (if any) incurred by him during the period of suspension of the work, but in the event of suspension ordered by the engineer for reason other than afore-mentioned and when each such period of suspension

exceeds 14 days the Contractor shall be entitled to such extension of time for completion of the works as the Engineer may consider proper having regard to the period or periods of such suspensions and to such compensation as the Engineer may consider reasonable in respect of salaries or wages paid by the Contractor to his employees during the periods of each suspension.

Clause No. 17(3) of the GCC:

In the event of any failure of delay by the Railway to hand over to the contractor possession of the land necessary for the execution of the works or to give the necessary notice to commence the works or to provide necessary drawings or instructions; or any other delay caused by the Railway due to delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the contractor to damages or compensation therefore but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable.

Clause No. 37.1 of the SCC:

The advance carries an interest rate of 10% per annum. The advance to other with interest accrued thereon will be recovered through an account of bills in installments, the recovery commencing when quantum of work executed and paid for reaches 15% of the contract value and shall be completed when the value of the work executed reached 85% of the contract value. The installment of recovery from each "on account" bill will be on pro-rate basis.

Clause No. 21.5:

No claim for idle labour and or idle machinery etc. on any account will be entertained. Similarly, no claim shall be entertained for business loss or any such loss.

6. In so far as Claim No. 1 is concerned, the learned Single Judge applied the principles of law laid down by the Hon"ble Supreme Court in General Manager Northern Railways and Another Vs. Sarvesh Chopra, to hold that Clause 63 comprised of the following two categories of claims which are just not leviable or entertainable:

- a. The first category of claims are those wherein the special conditions provide that they cannot be raised at all, that is, these are "no claim", "no damage" or "no liability" clauses.
- b. The second category of claims are those where the dispute itself has to be determined by an authority of Railways as provided under the relevant clause.

Claim No. 1 preferred by the respondent was for waiver of interest charges on mobilization advance recovered by the Department for the period of suspension of work, that is, for the period 31st October, 1995 upto 13th February, 1996. The plea of the appellant before the learned Single Judge was that the claim No. 1 fell within the SCC and was thus an "excepted matter". The learned Single Judge

had analyzed Clause 36(1)(c) of the GCC and Clause 37.1 of the SCC to conclude that in so far as claim No. 1 is concerned, i.e. claim for the waiver of interest on mobilization advance during the period of suspension of work, Clause 36(1)(c) did not bar such a claim, namely, waiver of interest. It was also rightly held that Clause 37.1 of the SCC did not deal with the issue at all. The learned Single Judge had held that Clause 36(1)(c) only deals with extension of time granted to the contractor in the event of suspension of work ordered by the Engineer if it exceeds a period of 14 days. The Engineer is also permitted to grant such compensation as considered reasonable in respect of salaries or wages paid by the contractor to his employees.

7. The learned Single Judge, in our view, has rightly concluded that Clause 36(1)(c) deals with extension of time to be granted to the contractor. It does not bar payment of salaries or wages during the period of suspension. In fact, the learned Single Judge has held that Clause 36(1)(c) does not contemplate a situation of a claim for waiver of interest, and even the Engineer can order the payment of such wages or salaries which may be paid by the contractor to his employees.

Similarly, the learned Single Judge has rightly excluded Clause 37.1 of the SCC which only enables the appellants to charge interest on mobilization advance during the course of execution or progress of work and does not cover a situation where the work was halted because of the employer, i.e. the appellant itself.

8. The learned Single Judge has also rightly held that as far as Clause 17.3 of the GCC is concerned, this was not pleaded before the Arbitrator and the appellant cannot be allowed to resort to this Clause before the Court. For this purpose, the learned Single Judge has relied upon the judgments of the Hon'ble Supreme Court in J.G. Engineer's Pvt. Ltd. Vs. Calcutta Improvement Trust and Another, and Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, . We entirely concur with the above view of the learned Single Judge which follows the binding position of law settled in the above decisions to the effect that pleas not taken before the arbitrator cannot be raised in a challenge to the award.

9. Even otherwise, the learned Single Judge came to the conclusion and in our view rightly so, that Clause 17.3 of the SCC has no application as that only deals with a situation where there is failure or delay by the Railways to hand over to the contractor possession of the amount necessary for the execution of the work and the extension of time for completion of such works. The interest on mobilization amount was rightly held by the learned Single Judge, not to be an issue covered by this clause. Accordingly, we are fully satisfied with the reasoning of the learned Single Judge and indeed affirm the same in so far as the claim No. 1 is concerned.

10. In so far as the claims No. 2 and 3 are concerned, the plea of the appellant was that this is covered by Clause 21.5 of the SCC i.e. no claim for idle labour and or idle machinery etc. on any account will be entertained. The learned Single

Judge has referred to Clause 36(1)(c) of the GCC which specifically deals with the eventualities where the work is ordered to be suspended and the said Clause clearly stipulates that the engineer may consider grant of such compensation as is found to be reasonable in respect of the salaries and wages paid by the contractor to the employees during the period of suspension. In our view the learned Single Judge has rightly analysed that Clause 36(1)(c) of the GCC is in the nature of a proviso to Clause 21.5 of the SCC and has gone on to hold that if a claim is made in the eventuality of suspension of work, for the period when the work was suspended, such a claim will be considered and granted. The learned Single Judge has also taken into account the fact that when this claim was raised and demanded by the respondent, the appellant had processed the claim.

11. Mr. Vivekanand, the learned Counsel for the respondent submitted that in fact, the payment had been made on the basis of the amount computed by the Engineer himself as is evident from the Arbitrator's award. The learned Counsel for the appellant, however, contended that the respondents were asked by the appellants to produce evidence. Having gone through the Arbitrator's record, we notice that the Arbitrator has only relied on the record of the Railways, which is duly signed by the respondent. The plea of the learned Counsel for the appellant, therefore, that the respondent did not furnish the record is not totally right because the Arbitrator while dealing with claim No. 2 had clearly expressed that the claim is only based on the Railways records.

12. The learned Single Judge has further analyzed the counter statement of the appellant where it has been clearly stated that the respondent did not process the claim nor responded efficiently to the appellant's initiative. In the light of the above, the learned Single Judge was right in concluding that the claim regarding idle labour would be governed by Clause 36(1)(c) of the GCC and not Clause 21.5 of the SCC. Accordingly, accepting the analysis of the learned Single Judge, we are satisfied that the learned Single Judge was justified in sustaining the award in respect of claims No. 2 and 3.

13. In so far as objections to the sustenance of claim No. 5 is concerned, it is not disputed that such a plea that it falls within the category of "excepted matters" was not taken before the Arbitrator and therefore could not be entertained. Such a plea is also not sustainable in view of the judgment of the Supreme Court in *J.G. Engineers Pvt. Ltd. v. Calcutta Improvement Trust* (supra) and *Narayan Prasad Lohia v. Nikunj Kumar Lohia* (supra), wherein applying the principle of waiver it was held by the Hon"ble Supreme Court that the respondent not having taken the objection with regard to the non arbitrability of the claim before the Arbitrator or any objection that the said claims were "excepted matters" and having contested the claims on merits, is estopped from raising such an objection after having suffered the award.

14. In so far as claim No. 7 is concerned, the said claim relates to the interest of 12% awarded by the Arbitrator and upheld by the learned Single Judge. In our view, the current position of law regarding interest has been laid down by a

Division Bench of this Court in the case of India Furnishers v. Punjab National Bank being FAO(OS) 261/2001 decided on 22nd April, 2009, wherein while referring to the judgments of the Hon"ble Supreme Court in Rajendra Construction Company Vs. Maharashtra Housing and Area Development Authority and Others, , McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, , Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd., and Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, it was held as under:

The interest of justice would be sufficiently met if the award is sustained, but, interest granted by the Award is reduced to 12% per annum and further in case the respondents makes the payments within four weeks from today then the interest would be at stand reduced to 9% per annum.

15. In view of the above, we are satisfied that the order of the learned Single Judge does not suffer from any infirmity and the appeal is dismissed, however, with the modification that the interest awarded by the learned Arbitrator and upheld by the learned Single Judge will stand reduced from 12% to 9% in view of the above position of law laid down by the Hon"ble Supreme Court.

16. The appeal stands dismissed with the above modification and is disposed of accordingly. All the pending applications also stand disposed of.