(2007) 07 DEL CK 0259

Delhi High Court

Case No: OMP 170 of 1998

Tehri Hydro Development Corporation Ltd.		APPELLANT
	Vs	
Lanco Construction Ltd.		RESPONDENT

Date of Decision: July 13, 2007

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 31(7), 34, 34(2)
- Contract Act, 1872 - Section 62

Citation: (2007) 3 ARBLR 194 : (2007) 97 DRJ 213 : (2007) 3 ILR Delhi 51

Hon'ble Judges: Badar Durrez Ahmed, J

Bench: Single Bench

Advocate: Vikash Singh, ASG and A.K. Vali, for the Appellant; Rakesh Dwivedi G. Ramakrishna Prasad, B. Suyodhan, Mohd. Warsay Khan and Venkat Subramanium, for the Respondent

Judgement

Badar Durrez Ahmed, J.

This is an application u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 1996 Act) praying for the setting aside of the award dated 07.05.1998 published by the respondent No. 2 (Mr. H.C. Bhardwaj) who was the sole arbitrator.

2. The applicant, Tehri Hydro Development Corporation (THDC) called for bids for the work of Coffer Dam, Package B for quarrying, transporting and placement of shell materials. The bids were received by THDC on 20.01.1994. Lanco Construction Limited (LCL) (respondent No. 1 herein) was one of the parties who responded to the tender. LCL''s bid was accepted by THDC. A letter of Intent was issued to LCL by THDC on 10.11.1994. Thereafter, certain other letters were issued. The formal contract was entered into between the parties on 05.01.1995 for initial amount of Rs. 8.38 crores. The schedule of items covered under the contract included item 3

which was as under:

3. Quarrying from Dobata borrow area, transporting and spreading shell material in uniform layers of specified thickness in shell zone including dressing, watering compacting up to required density with all leads and lifts etc. complete as per specification.

Clause 7 of the Informations and Instructions to Tenderers was as under:

7. The Contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his tender for the works and of the rates quoted in the Schedule of Quantities and rates which shall (except as otherwise provided in the tender) cover all his obligations under the contract and all matters and things necessary for the proper execution and completion for the works in accordance with the provisions of the contract and its maintenance during construction.

Clause 24 of the Informations and Instructions to Tenderers is the bone of contention in this application and it reads as under:

24. Borrow Area for shell material:

The shell material for dam fill (Zone 2A) shall be obtained from Dobata borrow area which lies approximately 5 km. upstream of dam site on the right bank of Bhagirathi river with existing level at 705M from MSL. The material for (Shell zone 2A) shall be obtained from this borrow area by selective borrowing and would in general require and proceeding except stripping top soil and removal of particles larger than 600mm. size in borrow area.

The following clauses of the General Conditions of Contract which govern the parties are relevant:

5.0 (ii) The drawings and technical specifications are to be considered as explanatory of each other and should anything appear in the former but is not described in the later, no advantage shall be taken by the Contractor of any such omissions. In case of disagreement between technical provisions and drawings, the technical provisions shall govern the contract. Should any discrepancies however appear or should any misunderstandings as to the meaning and interpretation of the technical provisions or drawings or dimensions or the quality of the materials for the proper execution of the work or as to the measurements of quantity and valuation of the work executed arise under this contract or in respect of extra item, the same shall be clarified by Engineer-in-Charge. The decision of the Engineer-in-Charge regarding the true intent and meaning of the drawings and specifications shall be final and binding.

xxxx xxxx xxxx

34.0(iii) Valuation of Variation

If, on certified completion of the whole of the works it shall be found that a reduction or increase is more than thirty percent of the contract value as awarded resulting from:

(a) the aggregate effect of all variation orders and

(b) all adjustments upon measurement of the estimated quantities set out in the Bill of Quantities or Schedule of Items and adjustment of price made under Price Adjustment clause.

The value of payment for the work beyond this limit will be varied by the percentages shown hereinafter for the plus and minus amount beyond the above limit.

Variation in contract value of work done	Increase in Payment for minus variation	Decrease in payment for plus variation
up to 30%	Nil	Nil
Above 30% and up to 35%	6.00%	3.00%
Above 35% and up to 60%	8.00%	4.00%
Above 60% and up to 100%	10.00%	5.00%

Provided further that if addition, deviation, or alteration to the work shall have the effect of increasing the work beyond 100% of the contract value, then the rates for the work exceeding 100% of the contract value, will be settled by agreement between the Contractor and the Corporation. Pending the finalisation of rates, the Contractor shall continue to complete all the work demanded and shall be paid for provisionally at rates mentioned in the provision herein before as if the variation had not exceeded 100%. If the rates so finalised, entitle the contractor to receive amounts over and above those already paid, the Contractor shall be paid the same upon submission and checking of the bill Therefore and if any amounts are due to Corporation on that account the same shall be recovered from the contractor.

Clause 6.02.04 of the Technical Specification is also relevant. It reads as under:

6.02.04 Zone 2A Material It shall comprise of terrace gravelly material from Old and New Dobata borrow areas, falling within the gradation limits shown on the drawings. It shall be hard, durable and weather resistant and shall meet the requirements as are normally set for concrete aggregates in respect of abrasion and water absorption tests.

The silt content for Zone 2A shall not be more than 5%. The zone 2C material in downstream shell fill was place up to EI 615.00 m in the working season 1990-91 and it is no longer required for further fill placement.

3. Disputes had arisen between LCL and THDC. The same were referred to arbitration. LCL filed the following three claims before the arbitrator:

16.2 The Claimant preferred the following claims before the Arbitrator:

a) Claim No. 1 for Rs. 2,15,50,600 on account of longer lead from shell materials for old borrow areas along with past, pendente lite and future interest.

b) Claim No. 2 for reimbursement of recovery effected from R A Bill on account of incorrect application of clause No. (iii) of Contract Agreement for Rs.2,49,56,700 along with past, pendente lite and future interest.

c) Claim No. 3 for cost of reference to Arbitrator Rs. 1,00,000.

4. Claim No. 1 was preferred by LCL on account of the additional lead due to non-availability of one of the borrow arrears for shell materials (Zone 2A). According to LCL, the new Dobata area, which was designated as a borrow area in the contract for the shell material, was not available and they had to obtain the shell material from the old Dobata area which involved a longer lead. It is in this background that the claim No. 1 was preferred.

5. Claim No. 2 was made by LCL on account of plea that the variation in the quantities were within the limits prescribed under Clause 34(iii) of the general conditions of contract referred to above. And, Therefore, there could be no reduction in rates. Since THDC had misapplied Clause 34(iii) of the General Conditions of contract, LCL claimed to be entitled to reimbursement of the reduced amount. According to LCL, the original contract value was Rs. 8.38 crores which was enhanced to Rs. 14.63 by an amendment to the contract and the actual work done came to Rs. 16.18 crores. The increase would have to be judged on the basis of Rs. 14.63 crores and not on the basis of Rs. 8.38 crores. Since the variation was less then 30%, no deduction under Clause 34(iii) was permissible. Claim No. 3 is not relevant for the purposes of this application as that had not been brought up by any of the parties.

6. It must be noted that both claim Nos. 1 and 2 were made along with the claim for past, pendente lite and future interest. With regard to claim No. 1, the arbitrator, after noting the various terms of the contract, including the said Clause 24 of Informations and Instructions to Tenderers, Clause 6.02.04 of the technical specifications, the drawings dated 02.06.1990 and 29.06.1992 and after noting the fact that in case of disagreement between technical provisions and drawings, the technical provisions shall govern the contract as per Clause 5(iii)(a) of the General Conditions of the Contract, held in favor of the claimant/LCL to the extent of 50%. The arbitrator also noted that THDC had constituted a committee comprising representatives of THDC and LCL to go into the claim of additional lead. The Committee recommended acceptance of 50% of the claim of the quantity and some payment was even released on the basis of the report of this Committee.

7. The award also indicates that in the technical specifications it was clearly mentioned in Clause 6.02.04 that Zone 2A materials shall comprise of terrace

gravelly material from old and new Dobata borrow areas. The arbitrator observed that, according to LCL, the entire quantity of materials was available from the new Dobata area which was nearer to the dam site. He further observed that since there was no specific limit for the quantity to be lifted from a particular borrow area, the claimant was entitled to lift the entire material from the borrow area which was nearer to the dam site. It was further noted in the award that since the new Dobata area was not available, LCL had to obtain the entire material from the old Dobata borrow area involving a longer lead. The arbitrator decided the claim of the LCL using the following logic:

However, I would be inclined to believe that while doing costing of this item for the tender, the Claimant must have taken into account that part of the materials would come from old Dobata areas and balance from new Dobata area.

It would be reasonable to assume that the Claimant would have based his bid considering that 50% of the quantity would be obtained from new Dobata area and the balance from the old Dobata area. Due to ambiguity in the various contract provisions and applying the rule of CONTRA PROFERENTUM, I would award the Claimant additional cost involved due to longer lead for 50% of the total quantity executed for this item of work. I Therefore award a sum of Rs. 1,56,54,100/- (Rupees one crores fifty six lacs fifty four thousand one hundred only) to the Claimant on this account as per calculation given below.

He also awarded past, pendente lite and future interest on the said amount. With regard to claim No. 2, the arbitrator observed as under:

18.8 Question of applying provision of above clause would have arisen only if the contract value would have been 8.38 crores as originally awarded.

The contract value was enhanced to Rs. 12.88 crores from Rs. 8.38 crores vide amendment No. 2 dated 21.08.95 by mutual agreement between the parties. The contract value was further enhanced to Rs. 14.63 crores vide amendment No. 3 dated 2.12.95 by mutual agreement between the parties. Since the total value of work done was within a deviation limit of 10% of the final contract value of Rs. 14.63 crores as amended on 2.11.95, question of applying increase or decrease in payment in accordance with Clause 34(iii) does not arise in this case.

In view of the arguments and evidence available and my order dated 24.12.97, I award Rs. 16,18,630.00 (Rupees sixteen lac eighteen thousand, six hundred thirty only) against this claim to the Claimants. I also award interest @ 18% p.a.

8. Mr. Vikas Singh, the learned Additional Solicitor General, who appeared on behalf of the THDC, submitted that the award is sought to be challenged u/s 34(2)(a)(iv) and Section 34(2)(b)(ii). He advanced submissions on three points. The first with regard to claim No. 1, the second with regard to claim No. 2 and the third with regard to the question of interest.

9. With regard to claim No. 1, Mr. Vikas Singh submitted that the contract was for quarrying, transportation of shell material from the Dobata area which, as per the said Clause 24 of the Information and Instructions to Tenderers was approximately 5 k.m. upstream on the right bank of the Bhagirathi river. He submitted that the technical specifications, as per Clause 6.02.04, specifically provided that the shell material shall comprise of terrace gravelly material "from old and new Dobata borrow areas falling within the gradation limits shown on the drawings." He submitted that LCL, in spite of such clear instructions, has made a claim that it was forced to lift material only from old Dobata area and that it was not permitted to lift material from the new Dobata area and has, Therefore, claimed for the extra lead for lifting material from the farther of the two Dobata areas. Mr. Vikas Singh submitted that the arbitrator did not appreciate the fact that both, the new and old Dobata, areas were mentioned for the purposes of lifting materials and that both these areas were within the 5 km. range as indicated above. There was, Therefore, according to Mr. Vikas Singh, no question of making any claim for lifting material from the old Dobata area as clearly the said area was a specified area under the contract. He also contended that the arbitrator on his own held that the contract was ambiguous and using the phrase"contra proferentum? held that LCL was entitled to claim for the extra lead. He submitted that although the award itself noted at one place that according to LCL there was no ambiguity in the contract yet, he applied the rule of "contra proferentum" and allowed the claim of LCL to the extent of Rs. 1,56,54,100/-. According to Mr. Vikas Singh, the award was contrary to the submissions made to the arbitrator as well as contrary to the express terms of the contract in relation to this particular claim and hence was opposed to public policy. Therefore, the award was liable to be set aside u/s 34(2)(b)(ii) of the 1996 Act.

10. Mr. Rakesh Dwivedi, the learned senior counsel appearing on behalf of LCL submitted that the Rule of "contra proferentum" had been employed by the arbitrator not as the main ground for allowing the claim of LCL but only as supportive reasoning. In any event, he submitted that as the contract does not say that it would be enough if one of the two areas was available to LCL for drawing the shell material, reference to the rule of "contra proferentum" was correct. He submitted that the Committee constituted by THDC also gave a similar recommendation. He submitted that the simple statement of non-acceptance of this recommendation by THDC does not, in any way, diminish the value of the report, particularly, as THDC has not given any good reasons to differ from the said recommendation.

11. Considering the rival contentions advanced by the counsel for the parties, it is clear that the controversy with regard to claim No. 1 centered around two issues. The first issue is with regard to the applicability of the Rule of "contra proferentum". The rule is embodied in the maxim "Verba fortius accipiuntur contra proferentum" which implies that words are to be interpreted most strongly against the party who uses them. This is, however, subject to the general principle that the contract under

consideration must be construed in accordance with the expressed intention see Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and Others, . It must also be noted that the rule does not come into operation until a doubt arises with regard to the construction of the contract or agreement see : Sahebzada Mohd Kamgar Shah (supra) and see : Halsbury''s Laws of India Volume 9 Para 120.167. It is, Therefore, clear that the rule is applicable only in the event of an ambiguity and cannot be invoked contrary to the intention of the parties as indicated in the contract. As I see it, the contract does not contain any ambiguity on this aspect. The clauses read together clearly indicate that the material was to be gathered from the old as well as the new Dobata borrow areas. There was no ambiguity about this. Therefore, reference to the said rule was not at all necessary.

12. But this does not mean that the arbitrator misdirected himself to such an extent as would entitle this Court to set aside the award. The scope of Section 34(2)(b)(ii) of the 1996 Act has been settled by the Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., in the following manner:

31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusager case it is required to be held that the award could be set aside if it is patently illegal. The result would be award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

The illegality that is necessary to enable the setting aside of an award must be such that it goes to the root of the matter. If the illegality is of a trivial nature, it cannot be held that the award is against the public policy. The award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Coming back to the facts of the case at hand, has the arbitrator committed such an illegality or is

the award so unfair and unreasonable that it shocks the conscience of the court

13. The claim of LCL is based on the fact that the new Dobata area which was closer to the dam was not available to it for the purposes of lifting the shell material. As a result of which a longer route had to be taken for the entire shell material which could only be lifted from the old Dobata area. When the contract term provided that the shell material could be lifted from the Dobata area which comprised of both the old and new areas, it was up to LCL to lift the material from whichever area was to its liking. It would have preferred to lift the shell material from the new Dobata area as that was closer to the site of placement i.e., the dam site, but, it was prevented from doing so for reasons beyond its control. The consequence being that LCL was forced to lift the material entirely from the old Dobata area which was further away and resulted in a cost increase. The arbitrator took these factors into account and also observed that while submitting its bid, LCL must have considered lifting the shell material from both the areas i.e., new Dobata and old Dobata. Instead of allowing the full claim of LCL, the arbitrator reduced the same by apportioning the lifting equally between the old Dobata and new Dobata. There may be arguments both for and against as to why the arbitrator took the figure of 50% and not some other figure. But it cannot be said that the arbitrator, in taking the figure of 50%, was unreasonable. The decision on this claim made by the arbitrator is not one which is so unfair and unreasonable that it shocks the conscience of the court. Consequently, this Court would not interfere with the award in respect of claim No. 1.

14. With regard to claim No. 2, Mr. Vikas singh submitted that under Clause 34(iii) of the General Conditions of Contract, if there was a reduction or increase of more than 30% of the contract value as awarded then there would be an increase in the payment for a negative variation and a decrease in the payment for a positive variation. He submitted that in the present case, the contract value had increased by enhancing the work to be done under the terms of the contract and, Therefore, the increase in work entitled the THDC to impose the decrease in the payment inasmuch as the positive variation was more than 30%. He submitted that this clause has been incorrectly interpreted by the arbitrator and hence the award in respect of this claim is liable to be set aside as it is opposed to the public policy of India.

15. In reply, Mr. Dwivedi submitted that in the present case, the initial contract value was fixed at Rs. 8.38 crores. By a letter dated 22.04.95, the THDC, while giving extra work by the very same document, amended the contract value by enhancing it to Rs. 12.88 crores. He further submitted that by another letter dated 2.12.95, the contract value was further enhanced to Rs. 14.63 crores. He submitted that this enhanced contract value of Rs. 14.63 crores would have to be taken as the basis for calculating the extent of variations. The actual work done was about Rs. 16.18 crores. Therefore, the difference between Rs 16.18 crores and Rs. 14.63 crores did not amount to a variation of more than 30%. That being the case, no deduction was

permissible under Clause 34(iii). It was submitted that once the contract value is enhanced then the original contract undergoes novation in terms of Section 62 of the Indian Contract Act, 1872 and it is the novated contract value which has been considered for the purpose of Clause 34(iii) of the General Conditions of Contract.

16. Considering the submissions made by the counsel for the parties, I am inclined to agree with those made by Mr. Dwivedi. When the contract value is enhanced, it becomes part of the contract. The enhanced value, Therefore, becomes the value of the contract. The variation that is referred to in Clause 34(iii) of the General Conditions of Contract is variation in the extent of work with reference to the contract value. This means that although the contract value remains the same, the extent of the work under that contract is different. The variation, Therefore, has to be seen with regard to the contract value which had been enhanced to Rs. 14.63 crores. Accordingly, I see no reason to interfere with the award in respect of this claim also.

17. Lastly, Mr. Vikas Singh, submitted that the arbitrator had gone wrong in holding that LCL was entitled to interest on the payments on account of claim Nos. 1 and 2. He submitted that Clause 51 of the General Conditions of Contract specifically provided that no claim for interest or damage would be entertained or be payable by the corporation in respect of any amount...or in any other respect whatsoever?. Therefore, there was no question of awarding interest. It was contended by Mr. Dwivedi that the award has been made under the 1996 Act. Section 31(7)(a) provides that unless there is agreement to the contrary, the arbitrator shall have power to award interest at such rates as he deems reasonable. He submitted, with reference to the Supreme Court decision in Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., that the arbitrator has the authority to award interest for all stages. He also submitted that the Supreme Court in the context of identical provisions in the contract regarding the non-entitlement of claims of interest held that such clauses do not take away the authority of the arbitrator to award interest. First of all, he placed reliance on The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age, The clause under consideration in that case was as under:

No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the Contractor or with respect to any delay on the part of the Commissioners in making interim or final payment or otherwise.

Interpreting this clause, the Supreme court observed that it merely prohibits the Commissioners from entertaining any claim for interest and does not prohibit the arbitrator from awarding interest. Though, in this case, the Supreme Court was not dealing with a case with regard to award of interest for the period prior to the reference, it observed that such a clause must be strictly construed and if it is so construed, the same merely prohibits the commissioners from paying interest to the contractor for delayed payment but once the matter goes to arbitration the

discretion of the arbitrator is not in any manner stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified. The supreme Court concluded by observing that under the said clause, the arbitrator was in no manner prohibited from awarding interest pendente lite.

18. The other decision relied upon by Mr. Dwivedi was in the case of State of U.P. Vs. Harish Chandra and Others, Here also the clause under consideration was similar. It read as under:

1.9 No claim for delayed payment due to dispute etc. - No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with the Government owing to any dispute, difference, or misunderstanding between the Engineer-in-Change in marking periodical or final payments or in any other respect whatsoever.

The question was with regard to award of interest prior to the date of reference and whether even if the arbitrator had the power and jurisdiction to award such interest, it was not barred by the above Clause 1.9. The Supreme court examined the said clause and came to the conclusion that the said clause did not bar the consideration by the arbitrator of such a claim for interest.

19. A similar decision of the Supreme Court is in State of Rajasthan and Another Vs. Nav Bharat Construction Co., and a division Bench of the Andhra Pradesh High Court has also taken a similar view following the decision in the case of Board of Trustees (supra) while construing the following clause:

No interest will be payable upon the earned money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in terms of Sub-Clause (1) of this clause will be repayable interest accrued thereon.

In State of Orissa Vs. B.N. Agarwalla, etc., , a decision relied upon by the applicant, it has been held that there can be no doubt that if the terms of the contract expressly stipulate that no interest would be payable then, notwithstanding the provisions of the Interest Act, 1978, an arbitrator would not get the jurisdiction or right to award interest. However, the position with regard to Clause 51 is an akin to what has been decided by the Supreme court in the case of Board of Trustees (supra) and other decisions referred to above. The prohibition that is contained in the said clause is for the THDC in entertaining any claim of interest on account of delayed or disputed amount and/or in making payments in respect thereof. It does not contain a prohibition insofar as the arbitrator is concerned. However, the arbitrator''s power to grant interest would be limited to the post reference period. And, Therefore, he would only be entitled to award interest pendente lite and for the future. The arbitrator has, while allowing claim Nos. 1 and 2 of the petitioner, granted past, pendente lite and future interest. That has to be restricted only to pendente lite and

future interest in view of the decision of the Supreme Court in the case of Board of Trustees (supra).

20. Accordingly, this application is disposed of with the only modification in the award that grant of interest for the pre-reference period is set aside. The rest of the award remains undisturbed. No order as to costs.